Gibson Greetings, Inc. *and* International Brotherhood of Firemen and Oilers, AFL–CIO *and* Betty Smith. Cases 9–CA–26706, 9–CA–27660, and 9–CA–26875

May 7, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 18, 1991, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a brief in support, and the General Counsel and the Charging Party filed cross-exceptions and briefs in support. All three parties filed answering briefs to each other's exceptions, and the Respondent also filed reply briefs to the General Counsel's and the Charging Party's answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.

This case involves an economic strike which began on May 1, 1989,[3] after negotiations had broken down between the parties. The strike ended on August 8, when the strikers made an unconditional offer to return to work. The General Counsel alleged that actions by the Respondent on May 1 and 15 were unlawful and that each act was sufficient to convert the strike to an unfair labor practice strike. The judge found that a letter sent by the Respondent to striking employees on May 1 violated Section 8(a)(1) of the Act, in that it threatened to deprive them of their *Laidlaw*[4] rights, but that this violation did not convert the strike. He further found that the Respondent violated Section 8(a)(5) of the Act on May 15 and again on May 21, when it insisted that the Respondent comply with its demands on a nonmandatory subject of bargaining as a condition of any further bargaining. He concluded that this 8(a)(5) violation sufficed to convert the strike to an unfair labor practice strike as of May 15. We agree with the judge's findings as to these matters, for the reasons set out below.

The judge also found that the employees hired during the strike were hired as permanent replacements for striking employees. Thus, he concluded that the Respondent was not required to displace those employees who were hired between May 1 and 14, because the strike was an economic one during that period. We disagree with the judge on this issue and find that the Respondent did not meet its burden of proving that the replacements shared with it an understanding that their employment was permanent. We find instead that the newly hired employees were in fact temporary replacements, and accordingly, we will order reinstatement of all strikers who made an unconditional offer to return to work.

1. The 8(a)(1) threat in the May 1 letter

The complaint alleges that by its letter dated May 1 to its striking employees, the Respondent violated Section 8(a)(1) of the Act by threatening to disregard the employees' *Laidlaw* right to reinstatement if job vacancies occurred after replacement employees departed. The letter discussed the Respondent's position on the two bargaining issues which separated the parties, and then concluded:

> We will begin to hire and train new employees immediately so you should understand that you have a right to work here which is protected by federal and state law *if you return to work before you are replaced*. It really is up to you. [Emphasis in original.]

The judge found that this language violated Section 8(a)(1) in that it threatened to ignore the employees' rights guaranteed by *Laidlaw*. He noted that the Respondent underlined the threat to prevent any employees from missing the point, and that it concurrently published a notice in the newspapers indicating that the rights of replacement workers would be respected.[5]

[1] The Respondent also filed a motion for oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

The Charging Party Union has moved us to receive into the record the unpublished opinion of the United States Court of Appeals for the Sixth Circuit in *Gibson Greetings v. Firemen & Oilers Local 77*, 947 F.2d 944 (1991), in which the court affirmed a district court order dismissing Gibson's suit for the Union's alleged breach of the no-strike clause in the 1986–1989 collective-bargaining agreement. We grant the motion, but note that we do not give that decision res judicata effect as to any issue in this proceeding.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1989 unless otherwise indicated.

[4] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

[5] The judge declined to find that this letter contributed to the prolongation of the strike, thereby converting it to an unfair labor practice strike. We agree. Although several strikers testified that they were distressed by the Respondent's letter, none suggested that it was because of that letter that the strike continued, nor that strikers discussed it collectively as a basis for continuing the strike. Most tellingly, in the numerous articles appearing in local newspapers about the strike, the letter was never mentioned by any employee or union spokesperson as contributing to the length of the strike. See *C-Line Express*, 292 NLRB 638 (1989) (evidence of employees' subjective motivation for continuing a strike considered relevant).

We agree with the judge that the language of the May 1 letter violated the Act. Under *Laidlaw*, a violation is made out when an employer indicates to employees that by striking, they will be deprived of their right to get their jobs back. The status of strikers as employees continues until they have obtained other regular and equivalent employment or until they leave the employer's employ. Even if replaced by permanent replacement employees, economic strikers who have made unconditional offers to return to work are guaranteed the right to full reinstatement when positions are available and to placement on a preferential hiring list if positions are not available.[6]

In *Eagle Comtronics*, 263 NLRB 515 (1982), the Board reviewed the rights of strikers with regard to reinstatement, and reiterated the principle that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. The Board held that an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, ''so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*.'' Id. at 516.

In *Emerson Electric Co.*, 287 NLRB 1065, l066 (1988), the Board held that the employer unlawfully threatened its employees with job loss by telling them that it did not have to take back strikers after the strike was settled. The Board found that the employer went beyond what was allowable under *Eagle Comtronics*, and threatened that as a result of the strike, employees would be deprived of their *Laidlaw* rights. We find the same to be true in the instant case. Here the Respondent went beyond informing the employees of the risk of being permanently replaced and implied that they would lose their rights to reinstatement if it replaced them before they abandoned the strike. We find this to be a violation of Section 8(a)(1) akin to that found in *Emerson Electric*, because it constitutes a threat that employees who remain on strike until hiring of replacements will be deprived of their *Laidlaw* rights.

2. The Respondent's insistence on a position related to its frivolous claim of a no-strike clause breach violated Section 8(a)(5) and converted the strike to an unfair labor practice strike on May 15

On May 15, 2 weeks into the strike, the parties met in the presence of a mediator. The Respondent, through its chief negotiator, William K. Engeman, stated for the first time its position that the May 1 strike violated the parties' 1986–1989 collective-bargaining agreement, which contained a no-strike clause. The contract, which carried an expiration date of April 30, 1989, reads in pertinent part:

6. WORK INTERRUPTIONS

6.1 The Union agrees that during the term of this Agreement neither it nor its officers, agents or any of the employees will authorize, cause, instigate, condone, or engage in any work stoppage, sitdown, strike, sympathy strike, unfair labor practice strike, slowdown, picketing, boycott or any other action which may interrupt or interfere with the operations of the Company including any refusal to cross picket lines at the Company's premises. The Company will not engage in a lockout during the term of this Agreement.

6.2 In the event of any violation of 6.1 above, the Union agrees that upon telegraphic notification by the Company to it of the existence of such violation, it will take immediate and affirmative steps with the employees involved (such as letters, bulletins, telegrams, employee meetings and directions of the authorized Union representatives to resume work under pain of internal Union discipline) to bring about an immediate resumption of work.

6.3 Any violation of 6.1 by any employee or employees shall constitute cause of [sic] immediate discipline and/or discharge, at the Company's discretion, provided that the question of whether or not any employee participated in such violation shall be subject to the grievance and arbitration procedures.

6.4 Should there be a violation of 6.1, there shall be no discussion or negotiations regarding any difference or disputes between the parties hereto during the existence of such violation before a resumption of work.

. . . .

13. DURATION

This agreement shall become effective on the 1st day of May, 1986, and shall remain in full force and effect until midnight on the 30th day of April, 1989, and shall automatically renew itself from year to year thereafter unless written notice to terminate the Agreement is given by a party not less than sixty (60) days prior to the expiration date or annual renewal thereof.

If notice to terminate is given, if practical, such notice shall set forth all proposed provisions of any proposed successor agreement and the parties shall promptly meet to negotiate with respect to the proposed successor agreement. In the event that negotiations for the successor agreement shall continue beyond the expiration of the term of the

[6] *Emerson Electric Co.*, 287 NLRB 1065, 1066 (1988).

> Agreement, this Agreement shall continue in full force and effect, provided, however, that either party may then terminate this Agreement upon ten (10) days written notice to the other party.

The Respondent's position was that the contract was still in effect at the time the strike began, because negotiations for a successor agreement were ''continuing'' beyond the expiration of the agreement within the meaning of the Duration clause. This being the case, according to the Respondent, the Union was required to give 10 days' notice to terminate the agreement before engaging in a strike.

The Union's chief negotiator, Edward Hartman, disputed the Respondent's position that the strike contravened the parties' agreement. He asserted that, because there were no further negotiations scheduled on April 30, the contract was no longer in effect when the strike began and therefore, the 10-day-notice provision did not apply. The May 15 meeting broke up without any bargaining over the substantive terms of any future contract.

The parties got together again on May 21; however, there was no face-to-face contact. All communication took place through the mediator. Hartman was given a letter from Engeman dated May 18 which stated, inter alia:

> As you know, we take the position that the strike is in violation of Section 6.1. We are willing to negotiate immediately upon your discontinuing it. Further, if we have written confirmation that any negotiations would not be considered a waiver of the Company's contractual position, we would be willing to negotiate on that basis.

At the end of the meeting, Hartman drafted what he considered to be the requested waiver, and it was given to Engeman. The parties' negotiations at that session centered on the Union's proposed strike settlement agreement. Again, the parties left the session without discussing any substantive contract terms. It was not until their next meeting, on May 30, that the parties took up discussion over the bargaining issues which separated them.

a. The judge's conclusion that the Respondent violated Section 8(a)(5) through a demand that was made on May 15 and persisted in until the Union capitulated to it is based on the following reasoning. The judge found that at the May 15 meeting Respondent made it clear that it would not bargain over the terms of the collective-bargaining agreement until the Union acceded to either one of two alternative demands. The Respondent demanded that either what the Respondent for the first time contended was an illegal strike be called off or the Union sign what amounted to a written waiver of any right to characterize the Respondent's continued participation in negotiations as an abandonment of its illegal strike contention. Bargaining did not resume until the Union submitted the written waiver. The judge further concluded that the Respondent's contention that the no-strike clause of the contract was somehow given extended effect by ''continuing negotiations'' when none were scheduled when the strike began was patently false. In summing up the judge stated,

> the position that the May 1 strike somehow violated the expired contract was no more that an afterthought, and not one taken in good faith. It follows that the Respondent's demands that were premised on this disingenuous position were made in bad faith, and Respondent's continued insistence on the bad-faith demands interrupted bargaining from May 15 through May 30.

The judge further found that this violation converted the strike from an economic to an unfair labor practice strike on May 15. Noting that the Respondent withdrew its unlawful demand only when it got one of its proposed alternatives, the judge found that the interruption in bargaining which resulted necessarily prolonged the strike, because the Respondent refused to discuss anything else until its demand was satisfied. The judge concluded that these actions converted the economic strike to an unfair labor practice strike, regardless of the attitude of the employees toward this conduct.

We agree with the judge on both points. As a preliminary matter, the Respondent's insistence on a nonmandatory subject—calling off the strike or waiving—as a condition of further bargaining violated Section 8(a)(5).[7] Whether this violation converted the strike is a question of fact which requires an examination of whether it can be proven that the unlawful conduct was a factor (not necessarily the sole or predominant one) in prolonging the work stoppage.[8] While we have no evidence that the individual strikers were directly motivated to prolong the strike by the employer's unlawful demands (indeed they may have been unaware of this conduct), we do have objective evidence which shows that the employer's conduct interrupted the course of bargaining and, as a fact, thereby prolonged the strike. It is undisputed that from the time the Respondent made its demand until after the Union complied with it, no bargaining over the contractual employment issues which separated the parties took place. This delay, completely attributable to the Respondent's actions, also tainted the bargaining climate and impeded opportunities for settlement of the strike.[9]

[7] See *Plattdeutsche Park Restaurant*, 296 NLRB l33, l37 (1989).

[8] *Gaywood Mfg. Co.*, 299 NLRB 697, 700 (1990), citing *C-Line Express*, 292 NLRB 638 (1989).

[9] See *Hydrologics, Inc.*, 293 NLRB 1060, l063 (1989), in which the employer unlawfully rescinded the parties' collective-bargaining agreement based on what it considered to be an unlawful strike. The

We thus find, in agreement with the judge, that the Respondent's unlawful conduct necessarily caused the strike to be prolonged.

b. The Respondent contends that even if the strike converted to an unfair labor practice strike, that it converted back to an economic strike once the parties resumed bargaining over substantive contract issues. For an unfair labor practice strike to revert to an economic strike, the employer's efforts at repudiation must either cure the unfair labor practice or otherwise succeed in removing the unfair labor practice as a factor in prolonging the strike.[10] While an actual ''cure'' is not always required,[11] some action to repudiate the unfair labor practice must be taken, after which the Board will examine whether the force of the unfair labor practice as a factor in prolonging the strike remains.

Here, the Respondent took no action to cure or even repudiate its unlawful conduct.[12] It was the action taken by the Union that allowed the negotiations to resume, i.e., the Union's execution of what amounted to a waiver of its right to argue that the Respondent by bargaining was abandoning its position that the strike violated the contract. The Respondent may not benefit now from its success in forcing the Union to capitulate to its unlawful demands. We hold that the Respondent's failure to repudiate its unlawful conduct affords a sufficient basis for finding that negotiations continued to be burdened and find that they were. The Respondent may not rely on the actions by the Union here as converting the unfair labor practice strike back to an economic strike.[13]

Board found that the employer's action converted the economic strike to an unfair labor practice strike by unlawfully broadening the areas of dispute and impeding any possibility of an early settlement. The same principles apply to the instant case. See also *Teamsters Local 515 v. NLRB (Reichhold Chemical)*, 906 F.2d 719 (D.C. Cir. 1990) (union's reasons for recommending strike can be imputed to employees).

[10] *Chicago Beef Co.*, 298 NLRB 1039, 1040 (1990), enfd. 944 F.2d 905 (6th Cir. 1991).

[11] *Trident Seafood*, 244 NLRB 566, 569–570 (1979), enfd. 642 F.2d 1148 (9th Cir. 1981).

[12] See *Gloversville Embossing Corp*., 297 NLRB l82 (1989).

[13] Contrary to our dissenting colleague, we agree with the judge that the Respondent's contention is ''patently false.'' We also agree with the judge that the contention was made in bad faith, a matter our colleague fails to discuss.

Finally, we disagree with our colleague's suggestion that efforts to preserve bona fide legal positions can never violate Sec. 8(a)(5) of the Act. The question is whether such efforts impeded bargaining and did so unnecessarily. The effort here clearly impeded bargaining. As explained above, the Respondent held up bargaining for 2 weeks because of its insistence on securing the Union's ''waiver'' of the right to make an argument concerning the significance to be attached to the Respondent's returning to the bargaining table. Even more significantly, the maneuver was clearly unnecessary as a means of preserving the Respondent's position. The Respondent was free to make its argument to the court regardless of what the Union argued; and the Respondent could have avoided having its return to the bargaining table treated as a concession of its position on the legality of the strike simply by advising the Union in writing that notwithstanding its return to the bargaining table, it was adhering to its view that the strike was illegal and it would maintain that position in court.

3. The issue concerning status of the strike replacements

The judge found that the individuals hired during the strike were hired as permanent rather than temporary replacements, and that, therefore, the Respondent was not obligated to lay them off when the strikers made their unconditional offer to return to work on August 8. He found that the prepared statement that was read to the replacements when they were hired indicated that the Respondent considered them to be permanent employees. The text of this statement is as follows:

> You are being hired as full time associates, but understand this—Due to the seasonal nature of our business, it must be understood that as a new Associate your employment may be subject to lay-offs. Each time that you are recalled for work we will only estimate the duration of time work is expected to last as we can never be certain.
>
> Each Associate currently on strike has the opportunity to return to work to an available job. Once they do this, their length of service and qualifications will be recognized for new openings and during reductions in the work force. Another possibility could be that if the Co. and the Union should renegotiate an agreement that allowed Union associates to return to work, the possibility exists that new associates may be layed [sic] off depending on the Company's manning requirements.

The only striker replacement to testify on the issue of what the Respondent told employees at the time of hiring was Wilma Chenault. When asked what she had been told by Tudor about how long she would be employed, Chenault testified, ''We was told, you know—we didn't know how long we was going to be there when we was a replacement. You know, just—till this was all over.''[14]

The Respondent moved to strike the contentions of the General Counsel and the Charging Party that the replacement employees were only temporary, arguing that the issue was neither pled nor litigated; alternatively, it asserted that it has proven that all replacements were hired as permanent employees. The judge found the motion to strike to be mooted by his conclusion that the replacements were hired as permanent employees.[15] The judge relied on *Belknap v. Hale*, 463

[14] The judge at fn. 21 found this testimony ''so vague as to be meaningless.'' We disagree and find that Chenault clearly stated her understanding that her employment was only temporary—until the strike ''was all over.''

[15] See judge's decision at fn. 23. To the extent that the Respondent's motion to strike remains viable, we deny it. The basis for the motion (other than that the issue was unalleged and unlitigated) is

Continued

U.S. 491 (1983), for the proposition that an employment contract promising permanent employment which is subject only to settlement with the union or to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objections during or at the end of what is proved to be a purely economic strike.

The Charging Party excepted to the judge's conclusion, and asserted that the Respondent failed to meet its burden of raising and proving the affirmative defense of permanent replacement. We agree with the Charging Party. While permanent replacement of strikers in order to continue business operations is a legitimate business justification for refusing to reinstate economic strikers upon appropriate application, it is still an affirmative defense on which the respondent has the burden of proof.[16] That burden includes proof that the replacement employees and the respondent had a mutual understanding and commitment on the permanent nature of their employment.[17]

In *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), the respondent contended that the striker replacements it hired were permanent employees, based on three things: (1) a letter its president sent to strikers stating that they ''may'' lose their right to reemployment if a replacement was hired for their position; (2) statements by the president to the replacements that he ''wanted'' to consider them as permanent and he ''wanted'' them to consider themselves as permanent; and (3) the respondent's repeated refusals during negotiations to displace the replacements. The Board, reversing the judge, found that the respondent's letter to strikers and statements to replacements were noncommittal, and that its statements during negotiations showed only its own intent to permanently employ the replacements. None of its evidence demonstrated the requisite mutual understanding between the respondent and the replacements that they were permanent. Thus, the Board found that the respondent had failed to satisfy its burden of showing that the replacements understood that they were permanent.[18]

The instant case presents a similar situation. Chenault's testimony indicates her understanding that her employment would continue only ''till this all was over.'' Tudor testified that when asked by interviewees what would happen to them once the strike was over, ''my response was that there was a possibility that the company and the union could renegotiate an agreement and that new hires could be placed on lay-off subject to their manning requirements at the time.'' This is far from an unequivocal assurance to the replacements that their employment was permanent. Thus, neither of the witnesses testifying on this issue indicated that the Respondent and the replacements shared an understanding that the replacements were being hired as permanent employees.

The only other evidence on the permanence issue[19] was the statement that the Respondent read to the replacements indicating that they were being hired as ''full time'' associates.[20] While one possible reading of this letter may be that the replacements would be retained regardless of the outcome of the strike, and that the strikers would be reinstated only to the extent there were new openings for employees, that is not the only reasonable interpretation. It could also be read to mean that the replacements should understand at the outset of their employment that the Respondent intended to return the strikers to their jobs once the strike ended under any one of several scenarios, and that accordingly, they should consider themselves to be temporary employees. We do not pass on what the Respondent's intentions were in drafting this letter, but we do find that it is susceptible to different interpretations. As such, it does not establish a mutual under-

the Respondent's assertion that the Regional Director dismissed an allegation that the strikers were not permanently replaced prior to trial that purportedly had been made by the Charging Party during the investigation of the charge in Case 9–CA–26706, albeit the Respondent concedes that the charge itself contains no such allegation. We find no merit to the Respondent's argument. The complaint alleges that an unconditional offer to return to work was made by striking employees and that the Respondent failed and refused to reinstate them. (These allegations are not limited to unfair labor practice strikers.) Having included these allegations in the complaint, the General Counsel need not go on to allege and prove nonpermanent replacement of strikers as part of his case. On the contrary, it is the Respondent's burden to prove the affirmative defense of permanent replacement, as detailed below. Having failed to carry its burden, the Respondent may not now contend surprise or prejudice. Due process required no more notice to the Respondent than that given in the complaint.

[16] *Associated Grocers*, 253 NLRB 31 (1980), enfd. mem. sub nom. *Teamsters Local 104 v. NLRB*, 672 F.2d 897 (D.C. Cir. 1981).

[17] *Associated Grocers*, 253 NLRB at 32.

[18] Cf. *Concrete Pipe Corp.*, 305 NLRB 152 fn. 9 (1991) (burden of proof on permanence issue met where record showed that replacements were assured that they were hired as permanent employees and were told that the only way this would change was if strikers were offered reinstatement as a settlement of the labor dispute).

[19] The Respondent points to a letter it sent on June 29 to all plant employees addressing issues relating to the strike, which reminded the replacements that, ''Every additional replacement hired means one less job for the strikers at the conclusion of the strike.'' The letter also states, ''we want to assure you that the Company has no intention to modify its position on . . . not discharging . . . those who have been through so much to do the work.'' We find this evidence insufficient to meet the Respondent's burden of proof. While the statements may imply that the Respondent considered the replacements to be permanent, it does not clearly state this. Moreover, the letter came nearly two months into the strike and does not reflect what the understanding of the Respondent and the workers was at the time of their hire some weeks before.

[20] We note that ''full time'' is the opposite of ''part time,'' and is not synonymous with ''permanent.''

standing that replacements were hired as permanent employees.

The Respondent asserts, however, that under *Belknap v. Hale*, an employer needs merely to hire replacements on an other than temporary basis within the meaning of the National Labor Relations Act, and that its failure to use the word ''permanent'' in its communications with the replacement workers does not constitute proof that they were hired as temporary employees.[21] It argues that in this day and age of the erosion of the employment-at-will doctrine, no prudent employer uses the word ''permanent'' in describing an employee's status. All that matters under *Belknap*, according to the Respondent, is that the replacements understand that their employment is not temporary, and in this case the employees clearly understood that.

The applicability of *Belknap* depends in the first instance on whether there has been an offer of permanent employment to replacement workers. As we noted in *Hansen Bros.*,[22] *Belknap* does not hold that an employer need no longer promise replacements permanent employment to render them permanent; it holds that to avoid civil liability to the replacements should they be replaced pursuant to a Board order or a settlement agreement providing for reinstatement of the strikers, the employer may promise the replacements permanent employment subject to such conditions subsequent. *Belknap* does not convert vague statements such as those of the employer in Hansen Bros., and those of the Respondent here, into an offer of permanent employment for purposes of determining reinstatement rights.[23] We reject the judge's reasoning, and the Respondent's exceptions based on *Belknap*. We find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate strikers on their unconditional offer to return to work on August 8.

[21] We note that the employer in *Belknap* clearly indicated its intent to hire permanently in both its advertisement in the local newspaper (seeking applicants to ''permanently replace striking . . . employees''), and in the statement it requested new hires to sign (where they acknowledged their understanding that they were being employed ''as a regular full time permanent replacement to permanently replace _____ in the job classification of _____.'') Further, it later addressed a letter ''to all permanent replacement employees'' assuring them of the permanence of their employment.

[22] 279 NLRB 741 fn. 6.

[23] If anything, an employer has a *greater* obligation to make clear its intent with regard to permanence when it is hiring employees during a strike than at any other time.

Here, Respondent admits that it did not use the word ''permanent'' in hiring the replacements, because of the erosion of the employment-at-will doctrine. This admission implies that the Respondent deliberately couched its employment offer to the replacements in terms that would leave room for it to give the offer any construction that would later serve the Respondent's purpose, such as in this case, an offer that could be construed as offering permanent employee status, but in an employment-at-will situation, something less than that. The Respondent cannot have it both ways.

4. Discriminatory treatment of strikers as compared with nonstrikers

We adopt the judge's findings and conclusions with regard to reinstatement of 10 strikers who were discharged by the Respondent for strike misconduct. We also grant General Counsel's cross-exception 2 and find that certain nonstriker misconduct, in addition to that discussed in the judge's decision, constituted evidence that the Respondent's discharge of strikers for alleged misconduct was discriminatory. In this regard, we note that the Respondent, while asserting that its policy was to treat striker and nonstriker misconduct equally in terms of investigation and punishment, failed to put such a policy into effect. The judge, while concluding that the Respondent failed to treat strikers the same as nonstrikers when they were equally at fault, failed to discuss the following relevant incidents.

First, the record reveals that the Respondent did not discipline nonstriker Warren Adams for driving too fast through the picket line, even though it was aware from reports in the guard's log that he had done this on several occasions. It appears that Adams was warned about this conduct more than once, but never disciplined, even though the Respondent's manager, Lloyd Anglin, admitted that he considered it to be dangerous.

Second, it also appears from the guard logs and a guard report that Adams spit in the face of striker Eva Blair as he crossed the picket line on July 17, 1989. Although those in charge of investigating such incidents were immediately informed, they just laughed about it, and no action against Adams was taken. We agree with the General Counsel that these incidents, in addition to the ones discussed by the judge, reveal the Respondent's disparate treatment of strikers vis-a-vis nonstrikers.

In all other respects, the decision of the administrative law judge is affirmed.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 7.

''7. Notwithstanding unconditional requests for reinstatement made by Betty Smith on her own behalf on July 25, 1989, and by the Union on behalf of all striking employees on August 8, 1989, the Respondent has discriminatorily refused to reinstate strikers to their former or substantially equivalent positions, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.''

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We have found that the Respond-

ent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate those employees who made unconditional offers to return to work on July 25 and August 8, 1989. Accordingly, we shall require the Respondent to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all employees hired to replace them. If, after such dismissals, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice utilized by the Respondent. The remaining former strikers for whom no employment is immediately available, shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired.

We shall further order the Respondent to make whole those former strikers for any loss of earnings they may have suffered by reason of the Respondent's refusal to reinstate them in accordance with their unconditional requests to be reinstated. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist language, ''in any like or related manner'' is appropriate. Accordingly, we deny the Charging Party's request for a broad cease-and-desist order.

ORDER

The National Labor Relations Board adopts the Order of the administrative law judge as modified below, and orders that the Respondent, Gibson Greetings, Inc., Berea, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Immediately and fully reinstate Darcus Ann Baker, Eva Blair, Mary Helton, Diane King, Terry Lear, Carl Long, Carolyn Moberly, Melvin Pennington, Edna Sparks, Gary Spires, Betty Smith, and all other of its employees who applied unconditionally for reinstatement, to their former or substantially equivalent positions of employment, if available, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, replacement employees in order to make positions available for them. Make whole these employees for any loss of earnings that they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section above. Place the remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent and offer them employment before any other persons are hired.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, concurring in part and dissenting in part.

I agree with my colleagues except with respect to their conclusion that Respondent's demands of May 15 and 21 were unlawful. In addition, although I agree with my colleagues that the replacements were temporary, I wish to set forth my separate views on this issue.

I turn first to my partial dissent. I do not agree that the Respondent's demands violated Section 8(a)(5). In this regard, I believe that Respondent's contention (that the strike was in breach of contract) was not a frivolous one. The contention centered on whether negotiations were ''continuing'' as of April 30. If negotiations were ''continuing,'' the no-strike clause would continue to apply. Concededly, as of April 30, no date had been set for another session. However, no party had broken off negotiations as of that date. In these circumstances, although a court ultimately agreed with the Union, the Respondent's position was not frivolous.

Because Respondent's position was not frivolous, Respondent could lawfully seek to preserve it. Respondent therefore told the Union that it would continue bargaining if the Union would agree not to contend, in a future proceeding, that such bargaining was a waiver of Respondent's legal position. The Union so agreed. In my view, an effort to preserve a bona fide legal position is not an 8(a)(5) violation. It follows that the conduct was not sufficient to convert the strike into an unfair labor practice strike.

In my view, an effort to preserve a bona fide legal position is not, per se and standing alone, a violation of Section 8(a)(5). Further, the fact that the legal position here was not taken until after the strike began does not, by itself, take away the bona fides of the Respondent's legal position.

My colleagues suggest that Respondent should have been content to simply state, and retain the right to argue, that a return to the bargaining table would not be a waiver of its legal position. However, Respondent's counsel made the professional and good-faith judgment that he wanted an assurance that a return to bargaining would not be a waiver of his legal position. In essence, my colleagues have ''second-guessed'' that judgment. In the circumstances of this case, I would

not base an unfair labor practice finding on the second-guessing of counsel's professional and good-faith judgment.

Because the Respondent's conduct was not an unfair labor practice, it follows that such conduct was not sufficient to convert the strike into an unfair labor practice.

I now turn to the issue of permanent vs. temporary replacement status. I concur in the conclusion that the Respondent did not meet its burden of establishing that the replacements were permanent. However, because of the importance of the issue, and because I do not agree with all the reasoning of the majority opinion on this issue, I wish to set forth my separate views.

In the first place, it is vital to understand the special meaning of the term ''permanent'' replacement in the lexicon of labor law. In that lexicon, ''permanent'' does not mean ''forever.'' It means only that the intention is to retain the replacement even after the strike is over. By contrast, a ''temporary'' replacement is one who is hired only for the duration of the strike. That is, once the strike is over, the intention is to take the striker back and lay off the temporary replacement.

Further, the term ''permanent replacement'' does not mean that there is an unconditional promise to retain the replacement. Rather, there is only the present intention to retain the replacement after the strike is over. Indeed, the employer can affirmatively disclaim any unconditional promises.[1] In that way, the employer can lawfully have permanent replacements and can nonetheless avoid breach-of-promise claims if it thereafter reinstates the strikers and lays off the replacements, e.g., pursuant to an agreement with the union, a settlement of an NLRB case, or a Board order or court decree.[2]

The employer has the burden of proving that replacements are permanent (as defined above). The employer must establish not only that it communicated that intention to the replacement but also that the replacement understood it. However, as to the latter point, I believe that the test is an objective one. If the employer clearly communicates words which show that permanent replacement is intended, the mere fact that the replacement subjectively understands that temporary replacement is involved would not preclude a finding of permanent status. For example, as noted above, an employer may clearly communicate words of permanent status, but then go on to say that no unconditional promises are being made. As discussed above, this statement is consistent with permanent status. But the employee may *subjectively* understand the disclaimer of promises to mean that permanence is not intended. In my view, this subjective understanding does not preclude permanent replacement status.

I now turn to the facts of this case. I note initially that the Respondent never used the words ''permanent replacement.'' Although this failure is not dispositive, and no magic words are needed, such failure made it more difficult for Respondent to meet its burden of showing that permanent status was intended. Respondent argues that, in light of *Belknap*, it would be foolish to use the term ''permanent.'' However, as discussed above, an employer can use the term ''permanent'' and yet disclaim making *Belknap* promises.

Respondent's use of the term ''full-time'' does not show an intention to accord permanent status. The fact that an employee is hired full time (rather than part time) says nothing about permanent vs. temporary status as these terms are used in labor law.

Concededly, Respondent's letter of June 29 (see fn. 18 of majority opinion) is consistent with permanent status. However, I note that the statement was made after the replacements were hired.

In all the foregoing circumstances, I conclude that Respondent did not meet its burden of showing that an intention of permanent replacement was communicated to the employees.[3]

[1] See *Hansen Bros.*, 279 NLRB 741 fn. 6 (1986), discussing *Belknap v. Hale*, 463 U.S. 491 (1983).

[2] I therefore disagree with the majority that an employer ''cannot have it both ways.''

[3] I do not rely on employee Chenault's testimony, even though it is consistent with temporary status. The judge found that testimony to be so vague as to be meaningless. I do not resolve this issue. Even if the judge is correct, that would simply mean that the testimony does not establish temporary status. However, the burden was on Respondent to establish permanent status.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you when you are engaged in protected, concerted, and union strike activity that you have the right to work for our company only if you abandon the strike and return to work prior to being replaced.

WE WILL NOT threaten you, when you are engaged in protected, concerted, and union strike activity that you cannot be reinstated to your job until you resign your membership in International Brotherhood of Firemen and Oilers, AFL–CIO.

WE WILL NOT solicit you to withdraw from the Union or assist you in submitting union withdrawal letters.

WE WILL NOT threaten you that we do not have a union and cannot have members of the Union in our plant.

WE WILL NOT discriminatorily discharge you because of your protected, concerted, or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately and fully reinstate Darcus Ann Baker, Eva Blair, Mary Helton, Diane King, Terry Lear, Carl Long, Carolyn Moberly, Melvin Pennington, Edna Sparks, and Gary Spires, all of whom we have found to have been unlawfully discharged, and we will immediately and fully reinstate Betty Smith, and all other of our employees who applied unconditionally for reinstatement to their former or substantially equivalent positions of employment, if available, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, persons hired on or after May 1, 1989, in order to make positions available for them.

WE WILL make whole, with interest, these employees for any loss of earnings that they may have suffered as a result of our discrimination against them.

WE WILL place the remaining former strikers, if any, on a preferential hiring list in accordance with their seniority or other nondiscriminatory practices utilized by us and offer them employment, and we will do this before any other persons are hired.

WE WILL, on request, bargain in good faith with International Brotherhood of Firemen and Oilers, AFL–CIO as the exclusive bargaining representative of the employees in the following unit and, if an understanding is reached, embody such understanding in a written, signed contract:

> All production and maintenance employees employed by us at our distribution facilities located on Walnut Meadow Road, Berea, Kentucky, including lead persons but excluding all clerical employees, professional employees and guards, and supervisors as defined in the National Labor Relations Act.

GIBSON GREETINGS, INC.

James R. Schwartz, Esq., for the General Counsel.
Frank H. Stewart and *Brian P. Gillan, Esqs. (Taft, Stettinus & Hollister)*, of Cincinnati, Ohio, for the Respondent.
Paul L. Styles, Esq., of Atlanta, Georgia, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act), was tried before me on 7 different dates between February 27 and March 14, 1991, at Berea, Kentucky. The original charge in Case 9–CA–26706 was filed against Gibson Greetings, Inc. (the Respondent), by the International Brotherhood of Firemen and Oilers, AFL–CIO (the Union), on August 7, 1989.[1] That charge included allegations that certain unfair labor practices occurred in May. Betty Smith, an individual, filed the charge in Case 9–CA–26875 against Respondent on October 6. A complaint based on Smith's charge was issued by General Counsel on November 21. On January 19, 1990, the Union filed an amended charge in Case 9–CA–26706. That amendment deletes the original allegations of unfair labor practices that occurred in May, but it adds allegations that certain other unfair labor practices occurred in May. A complaint based on the Union's charge in Case 9–CA–26706, as amended, issued on February 14, 1990. The charge in Case 9–CA–27660 was filed by the Union on July 3, 1990.[2] On September 4, 1990, General Counsel issued an order consolidating all three cases and issued a consolidated complaint and notice of hearing (the complaint).

Respondent filed answers admitting jurisdiction and the status of certain supervisors under Section 2(11) of the Act but denying the commission of any unfair labor practices, and affirmatively denying that the complaint's allegations of unfair labor practices occurring in May are supported by charges that were filed within the 6-months limitations period of Section 10(b) of the Act. General Counsel and the Union argue that the requirements of Section 10(b) are satisfied because the May allegations of the January 19, 1990, amendments to the charge in Case 9–CA–26706, and the complaint, are closely related to the allegations of misconduct in May that are contained in the August 7 original charge.

On the basis of the entire record, as corrected,[3] and my observation of the demeanor of the witnesses, and after due consideration of the briefs and motions filed by the parties, I make the following

I. JURISDICTION

At all times material herein, Respondent, a corporation with an office and place of business in Berea, Kentucky (Respondent's plant or facility), has been, and is, engaged in the operation of a factory and distribution center. During the year preceding issuance of the complaint, Respondent, in the course and conduct of its business operations, sold and shipped from its facility products, goods and materials valued in excess of $50,000 directly to purchasers located at points

[1] All dates are in 1989 unless otherwise indicated.

[2] A copy of this charge, service of which is admitted, is attached to the answer, G.C. Exh. 1(w), but not otherwise contained in the formal exhibits.

[3] The parties have filed a joint motion to correct the record. Certain errors in the transcript were noted and corrected.

outside Kentucky. Therefore, Respondent is now, and has been at all times material herein, an employer engaged in commerce within Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within Section 2(5) of the Act.

II. FACTS OF THE CASE

A. *Background*

Respondent's Berea distribution center services Respondent's greeting card manufacturing facilities at Berea, Cincinnati, Memphis, and Covington, Kentucky. At the time of the events in question, the plant had about 200 production and maintenance employees.

Respondent's operation is contained in a 600,000-square-foot building which has an 800-foot frontage on Walnut Meadow Road in Berea. All traffic must enter or leave the plant through a single gate on Walnut Meadow Road. A 600-foot, two-lane, driveway leads from the gate to the parking lot and the building.

The parties stipulated that, at all times relevant to this case, the following individuals were supervisors of Respondent within Section 2(11) of the Act: Lloyd Anglin, manager; Gerald Tudor, human resources manager until September 1989; Donald Dombrowskes, human resources manager beginning in September 1989; Harold Pruitt, ''supervisor'' until at least August 8, 1989; and Tom Bacon, engineer. The parties further stipulated that Steve Sweeney is Respondent's corporate vice president for human resources and is an agent of Respondent within Section 2(13) of the Act.

The Berea plant has been in operation since 1968, and the Union has represented the production and maintenance employees since 1977. There has been a succession of collective-bargaining agreements, the last of which was a 3-year contract executed in 1986 (the 1986 contract). The following sections were contained in the 1986 contract:

> 6. WORK INTERRUPTIONS
>
> 6.1 The Union agrees that during the term of this Agreement neither it nor its officers, agents or any of the employees will authorize, cause, instigate, condone, or engage in any work stoppage, sitdown, strike, sympathy strike, unfair labor practice strike, slowdown, picketing, boycott or any other action which may interrupt or interfere with the operations of the Company including any refusal to cross picket lines at the Company's premises. The Company will not engage in a lockout during the term of this Agreement.
>
> 6.2 In the event of any violation of 6.1 above, the Union agrees that upon telegraphic notification by the Company to it of the existence of such violation, it will take immediate and affirmative steps with the employees involved (such as letters, bulletins, [and other listed actions]) to bring about an immediate resumption of work.
>
> 6.3 Any violation of 6.1 by any employee or employees shall constitute cause of (sic) immediate discipline and/or discharge, at the Company's discretion, provided [that the parties may arbitrate participation issues].
>
> 6.4 Should there be a violation of 6.1, there shall be no discussion or negotiations regarding any difference or disputes between the parties hereto during the existence of such violation before a resumption of work.
>
> . . . .
>
> 13. DURATION
>
> This Agreement shall become effective on the 1st day of May, 1986, and shall remain in full force and effect until midnight on the 30th day of April, 1989, and shall automatically renew itself from year to year thereafter unless written notice to terminate the Agreement is given by a party not less than sixty (60) days prior to the expiration date or annual renewal thereof.
>
> If notice to terminate is given, if practical, such notice shall set forth all proposed provisions of any proposed successor agreement and the parties shall promptly meet to negotiate with respect to the proposed successor agreement. In the event that negotiations for the successor agreement shall continue beyond the expiration of the term of the Agreement, this Agreement shall continue in full force and effect, provided, however, that either party may then terminate this Agreement upon ten (10) days written notice to the other party.

An issue in this case revolves around Respondent's invocation of the above clauses, which are predicated on the existence of continuing negotiations at the time of contract expiration.

Before the expiration of the 1986 contract the parties met several times for bargaining, but no contract was reached. The Union's principal spokesman was representative Edward Hartman, and Respondent's principal spokesman was attorney William K. Engeman. Hartman was assisted by various employees and other union representatives; Engeman was assisted by Sweeney, Anglin, and others.

On May 1, the Union began a strike which terminated on August 8 with an unconditional offer to return to work. The complaint alleges that the strike was ''caused and/or prolonged'' by unfair labor practices of Respondent that began in May, and continued thereafter; however, on brief (p. 44), General Counsel withdraws any contention that the strike was caused by unfair labor practices.

The complaint alleges that the May 1 strike was converted to an unfair labor practice strike by two acts of Respondent, a May 1 letter to all employees from Anglin and a bargaining position taken by Respondent on May 15 and reasserted on May 21.

B. *Prestrike Bargaining*

On February 17, Hartman sent Anglin a ''notice to terminate our agreement.'' The parties met 10 times for negotiations before commencement of the May 1 strike. On Friday, April 28, at the close of the 10th session, the parties were apart on job bidding and health insurance. According to Hartman:

> Well, they said, ''We have a final proposal for you.'' I asked Mr. Engeman, ''Is this your best, last, and final proposal?'' His response to me was that, ''it is, unless you strike.''

Hartman testified that he told Engeman that the Union was going to conduct a membership meeting the next day; that

he was going to present Respondent's final offer without recommendation; that if the final offer was rejected, a strike vote would then be taken; and that if the employees voted to strike, the strike would begin ''Sunday night.''[4] According to Hartman, Engeman's only response was that, in the event of a strike ''the plant intended to operate. And they would do so, if necessary, with replacement employees.''

Respondent caused an advertisement for prospective production and maintenance employees to be placed in the local newspaper on April 29. The advertisement stated that Respondent was ''Accepting 400 applications because of possible labor dispute. . . . Your right to work is protected by Federal and State Law.''

Hartman testified that at the April 29 union meeting the employees voted to reject Respondent's final offer and further voted to begin a strike.

About 2 p.m. on April 29, Hartman called Tudor and informed him of the two votes. Hartman testified that he asked Tudor if Respondent wanted to meet for bargaining before the strike began the next day. Tudor replied that he did not know, and he asked Hartman to give his home telephone number.

Hartman testified that Engeman called him early on the afternoon of Sunday, April 30. Hartman testified that Engeman told him that he had heard that Respondent's last proposal had not been ratified and that a strike had been approved. Hartman confirmed Engeman's information. Engeman told Hartman that Respondent was preparing letters to the employees to instruct them on how their group health insurance could be continued, that Respondent was withdrawing certain proposals, and that he expected the Union to keep the strike activity peaceful.

Hartman testified that Engeman said nothing in their April 30 conversation about the strike possibly being in violation of the the 1986 contract, or about any future negotiation dates, or that the 1986 contract, somehow, remained in effect after April 30.

Hartman testified on April 30, after he talked to Engeman, he called Sweeney and asked if Respondent would agree to an extension of 30 days, or for any other period. Sweeney told Hartman to call Engeman. (In testimony which I credit, Sweeney testified that Hartman only suggested a 30-day extension.) Hartman did not call Engeman that day. Hartman testified that he called a mediator and asked that his contract-extension idea(s) be conveyed.

Engeman was called as a witness first by General Counsel, then by Respondent. In none of his testimony did Engeman dispute any of the foregoing testimony by Hartman about their exchanges on April 28 and 30.

C. *Beginning of the May 1 Strike*

The strike began at 12:01 a.m., Monday, May 1. Initially, there was a large percentage of employee participation; however, Respondent immediately began hiring replacements (whether permanent or temporary is an issue herein), and some employees who had originally joined the strike returned to work before the Union's August 8 unconditional offer to return.

Across Walnut Meadow Road from Respondent's facility, there is a field that is owned by Berea College. The strikers used this area to park their cars and assemble for picketing duties. Also, the employees stationed a camper-type trailer (with canvas ''pop-up'' super-structure) on the same side of Walnut Meadow Road that Respondent's plant is located, within a few feet of the point where the driveway meets the public road. (The camper could have been on public right-of-way; at any rate, Respondent made no attempt to have it moved from Respondent's side of Walnut Meadow Road.) The strikers used the camper as a resting and observation point.

Picketing was conducted throughout the days and most of the evenings. Those picketing walked back and forth across the driveway, as much as 25 feet off Walnut Meadow Road. The groupings in the field on the opposite side of Walnut Meadow Road grew larger when it was time for a shift change of strike replacements. (Three shifts operated during the strike, the third being only a minimal staffing.)

The Respondent obtained a state court injunction against mass picketing and alleged violence during the first week of the strike. The Union continued its strike and picketing of the plant until the offer to return on August 8. The picketing included about 24 different sign legends, and it was conducted at points away from the plant, as well as at the plant. Handbilling was also conducted away from the plant.

D. *Respondent's May 1 Letter to Employees*

On May 2, Anglin sent to all employees a letter that was dated May 1 (the May 1 letter). In three numbered paragraphs, Anglin explained the Respondent's position on the the two issues that then separated the parties (Respondent's proposal for a new job bidding system and insurance). The letter concludes:

> That's what this is all about. I believe in it and I will be at work every day trying to make this plant work. I know a lot of you will be joining me.
>
> The Union has threatened to fine members who return to work. To avoid that, you should resign first before you come back to work.
>
> We will begin to hire and train new employees immediately so you should understand that you have a right to work here which is protected by federal and state law *if you return to work before you are replaced*. It really is up to you.

The emphasis is Anglin's.

The complaint alleges that by this letter Respondent independently violated Section 8(a)(1) because the letter constitutes a threat to disregard the employees' statutory rights to reinstatement if job vacancies occur after replacements depart, or *Laidlaw*[5] rights, and that it contributed to the prolongation of the May 1 strike.

Some employees testified that they were distressed by the letter, and feared that they may lose their jobs, but none tes-

[4] Apparently, Hartman here meant, and Engeman understood, that the strike would begin at some point during the night that began on Sunday; there is no contention that the Union threatened to strike, or did strike, before 12:01 a.m., Monday, May 1.

[5] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

tified that the letter, in any way, contributed to any decision that would have prolonged the strike.

E. *Respondent's May 15 and 18 Demands*

The complaint, paragraph 13, alleges

> On or about May 15 and May 18, 1989, and at all times thereafter, Respondent has conditioned continued collective-bargaining negotiations upon the Union's agreement to discontinue the [May 1 to August 8 strike] and [the Union's] further agreement in writing that continued negotiations by Respondent did not constitute a waiver of Respondent's position that the said strike violated provision of the parties' recently-expired collective-bargaining agreement.

Although this paragraph of the complaint is couched in the conjunctive, the evidence shows, and General Counsel contends, that Respondent was making alternative demands: stop the strike or execute the waiver.

Hartman testified that at the May 15 bargaining session, Engeman stated, for the first time, that the April 30 strike was ''illegal'' from its inception because the Union had not given 10 days' notice before striking, citing articles 6 and 13 of the parties agreement, as quoted above.

Hartman testified that he told Engeman that the strike was not illegal. Engeman asked Hartman if Hartman was taking his position because Respondent had not provided the telegraphic notice of a violative strike that is required by section 6.2 of the 1986 contract. Hartman replied that, while it was true that Respondent had not given a notice such as that required by Section 6.2, ''we also were taking the position that there were no further negotiations scheduled and that section of the contract requiring ten day advance notice did not apply in this case.''

Hartman testified that at one point in the May 15 session:

> [I asked:] ''Are you here to negotiate for a new agreement to try to resolve the current dispute, or are you simply here to tell us that we are in violation of the no-strike clause of the contract?''
>
> [Engeman replied:] ''number one . . . we're maintaining that the—that the strike is illegal and we need to know from you if you agree with that position. Number two, if you don't agree with that position, is it because we haven't notified you as required by telegraph?''

Hartman repeated his answer that the Union had not received such notice, but the contract was not in effect at the time of the strike because negotiations had not been continuing. After that, the meeting broke up without any discussion of the terms of any future contract.

Engeman did not deny any of this testimony by Hartman.

Hartman testified that after the meeting, he went to the field across from the plant where about 200 people, mostly strikers, had gathered. He reported what had happened at the meeting, including Respondent's assertions that the strike was ''illegal.'' He was asked by employees in the group what it would mean if the strike were, in fact, ''illegal.'' Hartman told them that, in that case, Respondent could discharge them. Some of the gathered employees expressed distress over Hartman's report to them.

When called by General Counsel, Engeman acknowledged that, as of the April 30 expiration of the 1986 contract, there were no negotiations scheduled. Engeman testified that he believed that negotiations were continuing beyond the expiration date, within the meaning of section 13 of the 1986 contract, because, on April 30, both he and Hartman had taken the position that future negotiations should be held.

Another bargaining session was scheduled for May 21. The parties did not meet face-to-face; they exchanged communications through the Federal mediator. Hartman was given a letter from Engeman dated May 18. In the letter Engeman states, inter alia:

> As you know, we take the position that the strike is in violation of Section 6.1. We are willing to negotiate immediately upon your discontinuing it. Further, if we have written confirmation that any negotiations would not be considered a waiver of the Company's contractual position, we would be willing to negotiate on that basis.

Hartman drafted what he considered to be the requested waiver, and he gave it to the mediator. The parties left the meeting without discussing any terms of any future contract.

After the meeting, Hartman spoke to Engeman by telephone and asked if the waiver was adequate. Engeman replied that it was, and asked Hartman to restate the waiver in a letter. By letter dated May 23, Hartman replied to Engeman that he did not agree with all of the factual assertions in Engeman's May 18 letter but:

> In response to your request in paragraph three, please be advised that it is agreed and confirmed that any negotiations held will not be considered a waiver of the Company's interpretation, or the Union's interpretation, of [articles 6 and 13].

The parties met again on May 30, June 1 and 11, and July 5 and 28. Hartman credibly testified that Engeman consistently stated that the strike had been illegal from its inception. Hartman did not testify that, at any point after May 30, Engeman refused to discuss any contract item when requested to do so. No agreements were reached in the bargaining that began on May 30, and the bargaining, and the strike, ended on August 8 with the parties still divided on the issues of health insurance and job bidding. The issues have never been resolved, and there was no contract between the parties at time of trial.

The Union issued veritable reams of press releases and other publications during the strike, seeking to persuade any reader of the justness of the strike. On cross-examination, Hartman acknowledged that none of the Union's publicity alleged that Respondent had been bargaining in bad faith. The parties further stipulated that none of dozens of different picket sign legends used during the strike, at or away from the plant, alleged that one of the reasons for the strike was alleged unfair labor practices on the part of Respondent.

On direct examination, Engeman detailed the post-April 28 bargaining sessions. He denied that the Union ever mentioned any of the alleged unfair labor practices herein as a basis for the strike. He testified, credibly, that the Union persistently insisted on amnesty for strikers who had been ac-

cused of violence (discussed below) and return of all strikers as part of any strike settlement agreement.

Engeman also testified that he did not raise the contention that the scheduled strike would be in violation of the 1986 contract on April 28 or 30 because he really felt that a strike would not occur. Engeman testified that he did not raise the issue until May 15, because he wanted to present it to Hartman ''face-to-face.''

On cross-examination, Engeman was asked and testified:

> Q. And was it your plan to drop the idea of the illegal strike, if in fact, the union got back together with the negotiator?
>
> A. My plan was to do exactly what I did, which was to raise it. If it caused a settlement, then fine. If it didn't cause a settlement, I was going to get it off the table and I got it off the table.

Engeman testified that he considered the waiver to be only the subject of a ''request,'' not a demand, and (although he appeared only as a witness) he argued that Hartman's letter of May 23 demonstrated that Hartman did also.

Further on cross-examination, Engeman testified that it was within the week following the commencement of the strike that Respondent's principals, on his advice, made the decision that the strike, at its inception, had been in violation of the contract. Sweeney also acknowledged on cross-examination that the possibility that the strike was in violation of the 1986 contract was first discussed ''within a day or two after the strike actually commenced.''

F. *Individual Offers to Return to Work*

1. Applications of Piersall, Carpenter, and Mink

The complaint alleges that Respondent engaged in certain violations of Section 8(a)(1) while entertaining some individual employees' applications for reinstatement that were made before the strike ended. More particularly, the complaint alleges that on or about May 24, Respondent ''solicited employees to withdraw from the Union and assisted them in submitting Union withdrawal letters.'' The complaint further alleges that, on or about July 31, Respondent, by Tudor, ''threatened employees that they could not be reinstated to their jobs until they resigned their membership in the Union,'' and, further that Tudor ''threatened an employee by stating that Respondent did not have a Union and could not have Union members in the plant'' on or about July 31. (The complaint does not allege that any of this conduct tended to prolong the May 1 strike.)

Della May Piersall testified that she participated in the strike until the week before it ended. During that week she called Tudor and asked if she could come to work. Tudor told Piersall that she would have to come to the plant, crossing the picket line, and apply. Piersall testified:

> When I went in, Mr. Tudor said that I was being investigated for picket line misconduct. He gave me a paper stating that. And I asked him what it meant, what it entailed, and he said there would be an investigation later into it and I would hear more from that. They would tell him when the investigation date would be. . . . I asked him, I said, you can't help me about getting my job back. And he said, no, not till after the investigation had taken place. And he said to—I got up to leave then, and he told me that did I know I had to resign from the Union before I could go back to work in there? And I told him, no. I asked him why. And he said there was not a Union in there anymore and you couldn't be a Union member to be considered for reemployment. I asked how to go about doing that and he said I would have to write a letter and send it to the Union that I was going to resign from the Union.

On cross-examination Piersall acknowledged that she did, in fact, resign from the Union, using her own stationery and postage. She further testified that she asked Tudor if Respondent had a form that she could just fill out and send, and Tudor replied that Respondent did not.

Piersall testified that she had been employed elsewhere ''a year'' and General Counsel apparently concedes that she had accepted permanent employment elsewhere before the August 8 offer to return to work. (Piersall is not named on G.C. Exh. 18, which is a list of unreinstated strikers for whom the complaint seeks remedy.)

General Counsel also called Jasper Carpenter who had worked for Respondent for 18 years before the strike. Carpenter testified that during the week before the strike ended, he also went to the plant to talk to Tudor about returning to work. On direct examination Carpenter was asked and testified:

> Q. And what did [Tudor] say?
>
> A. And he wanted me to write something out on a paper resigning and I—I told him I couldn't because I drove through the picket line. I was nervous. And he filled it out and I signed it.
>
> Q. What did he fill out?
>
> A. I don't know. I didn't even read it. It was a piece of paper or something.
>
> Q. Did you have any discussion as to what the purpose of that piece of paper was?
>
> A. Yes. I asked him about—before I signed it, if this would interfere with me going back to work, you know, when it was settled and it was over, with the Union.
>
> And he said that . . . you'll be the first one back if something comes open. Which I wasn't, but that's what he told me.
>
> And I asked him if it would interfere later on and he said that they wasn't planning on being bothered with the Union later on.

On cross-examination, Carpenter added, flatly, ''He said I would have to resign from the Union to go back to work.''

Carpenter was told by Tudor that there were no jobs available at that time. Carpenter was not reinstated at the end of the strike, and General Counsel seeks remedy on his behalf.

Nine-year employee Nina Mink testified that, during the last week before the end of the strike, she also went to the plant to seek reinstatement. Mink testified:

> I told him that I wanted to come back to work and he said that they didn't have any openings at the time, that they had twelve posted, but they had cut back twelve.
>
> And he said that if I came in and went to work, I could be fined; that if I resigned from the Union, and

then went to work, that I couldn't be fined. And he asked me if I wanted to resign from the Union to be put on the recall list. And I said yes. . . . And then he told me it would be $2.00 to mail the letter, and he had me to write out a note to [Union Representative] Daryl Johnson that I was resigning.

Mink was further asked and testified:

Q. And who wrote—who made up the language of the resignation?

A. Well, he told me what to write down.

Q. And did you write that down, then?

A. Yes.

Q. And what did you do with what you had written down?

A. We took it back to [Anglin's secretary], and I gave her the $2.00 and she gave me an envelope and the certified stamps.

Mink has not been reinstated, and General Counsel seeks reinstatement remedies for Mink in this case.

Tudor was called by Respondent and testified that during the first week of the strike, Respondent received over 1000 applications from would-be strike replacements. Tudor denied telling Piersall that she could not be reinstated to her job unless she resigned from the Union, or that Respondent did not have a union and could not have union members in the plant.

Tudor testified that when Carpenter appeared for reinstatement, he told Carpenter, as he told all other applicants who were Union members, that the union had threatened to fine members who crossed the picket line, which it had, ''and to avoid that he had the opportunity, if he wanted to, to resign from the Union, but that was, again, up to him.'' Tudor was further asked and testified:

Q. Very well. And what did Mr. [Carpenter] say in response, if any-thing?

A. He—he said he would resign and Jasper asked me to assist him. He was very uncomfortable, I remember.

Q. How do you—what do you mean by the word uncomfortable?

A. Well, he seemed—he seemed nervous at the point because he asked if I would assist him by writing his letter. And I did that. I printed his letter for him.

Q. Very well. And then what happened?

A. Jasper signed the letter.

Q. And who mailed it?

A. We mailed it at the facility. I also—I also told him that certain people had, had their letters returned to them—the resignation—and I asked him if he thought it advisable that he could have his letter certified—at least he'd have proof of delivery. And he said he did, and he paid [$2] for the certification.

. . . .

Q. Now, Mr. Tudor, did other employees request any kind of secretarial or other help as it relates to resignation?

A. Some did.

Q. What type of help was requested?

A. Well, some, of course to start with—some had already made their resignations and mailed them or hand delivered them themselves. And others did ask for clerical help in either typing their letter or for a piece of paper to write it on.

Q. Did your office staff put these letters through the regular U.S. mail?

A. In some cases, yes.

Q. Did you ever examine your practice—or re-examine your practice of mailing these letters?

A. Yes.

Q. When?

A. That again was sometime in early August when we were—I was advised by Mr. Anglin that should a person ask assistance in having their letters mailed, that they should—they should pay the fee or have them do so.

Q. And did you do so thereafter?

A. Yes.

Tudor denied telling Carpenter that he could not be reinstated unless he resigned his membership in the Union or telling Carpenter that Respondent would no longer have a union in the plant.

Tudor further testified that he told Mink no more than he told Carpenter, and he specifically denied telling Mink that she had to resign from the Union before she would be reinstated. Tudor testified that he could not remember if he gave Mink any clerical assistance in resigning from the Union.

Piersall and Mink were perfectly credible in their demeanor; moreover, it is noted that Piersall has absolutely nothing to gain by her testimony; she is not listed by General Counsel's Exhibit 17 as one who would be entitled to remedy. Mink and Carpenter are listed on the exhibit; however, Mink and Carpenter would be no more entitled to remedy if their testimonies were credited; General Counsel does not claim that Tudor's actions toward them prolonged the strike. I was suspicious that Carpenter's testimony was colored by some anger that he appeared to hold toward Respondent, and it cannot be said that he had a completely positive demeanor. However, Tudor impressed me more unfavorably than Carpenter, and certainly more unfavorably than Piersall and Mink. Therefore, except for Tudor's admissions of assisting employees in resigning from the Union, including ''in some cases'' putting the letter in the mail for the employees, I do not credit any of his testimony on this point. That is, I simply did not believe Tudor's denials of the testimony of Carpenter, Mink, or Piersall, and I credit the employees where they and Tudor are in conflict.

2. Application of Betty Smith

The complaint alleges that Respondent violated Section 8(a)(3) by its rejection of an individual application to return to work that was submitted by Charging Party Betty Smith before the Union's offer of August 8. Smith was a 10-year employee who initially joined the strike, but who, on July 25, applied for reinstatement as an order-filler. The parties stipulated that Respondent reinstated one employee who had more seniority, and many employees who had less seniority, than Smith although those employees applied for reinstatement after Smith (and before the Union's August 8 offer to return to work that was made on behalf of all other striking employees).

When Smith applied on July 25, she was told that she was under investigation for alleged strike violence and that she could not be reinstated until the charges against her were cleared up. Smith was never told that she was fired, but she also was never reinstated.

General Counsel contends that Smith should have been reinstated before the other employees named in the stipulation because she applied for reinstatement before they did. Respondent contends that it was under no duty to reinstate employees according to the sequence of their individual application, and Respondent further contends that it was under no obligation to reinstate Smith at the time she applied because, at that time, Respondent was acting under a good-faith belief that Smith had engaged in disqualifying strike misconduct.[6]

G. *The Union's Offer to Return to Work*

Respondent admits that on August 8 an unconditional offer to return to work was made by the Union on behalf of all striking employees; however, Respondent denied reinstatement to 177 of the strikers, and it discharged 10 others. The complaint alleges that by the discharges and refusals to reinstate strikers, Respondent violated Section 8(a)(3) of the Act.

1. Strikers allegedly replaced

As noted, Respondent began to hire replacements as soon as the strike began. On brief, General Counsel and the Union argue that, assuming that it has not been proved that the strike was prolonged by unfair labor practices of Respondent, Respondent has not proved that the replacements were hired as permanent, and all strikers should have been reinstated at the termination of the strike, displacing immediately any employee who had been hired as a (temporary) replacement. Respondent has moved to strike the briefs' contentions in this regard, arguing that the issue was neither plead nor litigated; alternatively, Respondent contends that it has shown that all replacements were hired on a permanent basis.

The parties stipulated that the following statement was read the all replacements during the strike:

> You are being hired as full time associates, but understand this—Due to the seasonal nature of our business, it must be understood that as a new Associate your employment may be subject to lay-offs. Each time that you are recalled for work we will only estimate the duration of time work is expected to last as we can never be certain.
>
> Each Associate currently on strike has the opportunity to return to work to an available job. Once they do this, their length of service and qualifications will be recognized for new openings and during reductions in the work force. Another possibility could be that if the Co. and the Union should renegotiate an agreement that allowed Union associates to return to work, the possibility exists that new associates may be [laid] off depending on the Company's manning requirements.

The statement was printed on forms which bore spaces for signatures of the replacements and representative of Respondent (presumably the one who read the statement to the replacement).

Only one striker replacement testified that she was told that her hiring was anything but permanent. On the 6-day of trial, after General Counsel and the Union had rested, Wilma Chenault was called by Respondent to testify that, after she was hired on May 3, she was subjected to striker violence, as discussed infra. On cross-examination by General Counsel, Chenault was asked nothing about the process of her being hired. After her examination by General Counsel, the Union's counsel asked for production of Chenault's pretrial affidavit. After introducing himself, counsel asked Chenault, and she testified:

> Q. First thing, I understand when you first went to work at—you were told by Mr. Tudor that he didn't know how long you would be employed and didn't say anything about if you would be a temporary or permanent replacement. Is that right?
>
> MR. GILLAN [for Respondent]: Objection.
>
> JUDGE EVANS: Overruled. That means you can answer.
>
> A. We was told, you know—we didn't know how long we was going to be there when we was a replacement. You know, just—till this was all over.

The matter was not thereafter pursued by any party.

2. Strikers discharged for alleged threats or violence

Anglin appointed industrial relations engineer Thomas Bacon to be in charge of plant security during the strike. Bacon's duties were to oversee the operations of a contract security service that Respondent retained to guard the plant and maintain an incident log of violence reports, and maintain videotape surveillance of the plant entrance as replacements and others came and left. Bacon was also to conduct followups of all reported strike violence, get written and oral witness statements, and report his findings to Anglin and local police authorities.

After the Union's August 8 offer to return to work, a number of employees (not determined in the record) were notified that they would not be reinstated, even if jobs came open, until allegations of misconduct against them were resolved. On January 11, 1990, upon completion of all investigations by Respondent, the following 10 employees were discharged: Darcus Ann Baker, Eva Blair, Mary Helton, Diane King, Terry Lear, Carl Long, Carolyn Moberly, Melvin Pennington, Edna Sparks, and Gary Spires. The complaint alleges that, by these discharges, Respondent violated Section 8(a)(3) and (1) of the Act.

a. *Darcus Ann Baker—the flashlight incident*

Anglin testified that he discharged Darcus Ann Baker on the basis of a written report by Charles Eugene Bunch that Baker had thrown a flashlight at his truck and damaged it as Bunch drove the truck through the picket line.

Bunch testified:

> I work third shift and I start at 11:00. It was late July—toward the end of July when I was going to

[6] The Charging Party Union (which also represents the more than 175 striking employees who would have been prejudiced had Respondent not rejected Charging Party Smith's application) takes no position on this issue.

work. And as I started to turn in, they had wood shavings piled up across the entrance.

So, in order to avoid a pile of wood shavings, I may not have exactly come in correct, or as straight as I was supposed to, or whatever. And Ann Baker walked across in front of me and as I went by, she stepped aside and threw a flashlight and hit the side of my vehicle.

Bunch was was asked on direct examination and testified:

Q. Okay. If your vehicle had continued through the entrance—well, strike that. When you saw Ann Baker walking in front of you, what did you do?

A. I just proceeded on in.

Q. Okay. And what was Ann Baker's reaction?

A. She stepped aside and threw her flashlight at me.

Bunch testified that ''I may not have exactly come in correct, or as straight as I was supposed to'' because, ''I'd been told by several people that sometimes they [those on the picket line] use the wood shavings for camouflage to hide nails and stuff.'' Bunch was asked what damage had been done and he replied, ''It left a dent and a black mark right above where the mirror on the right-hand side of the vehicle was.''

On cross-examination by the Union, Bunch was asked and testified:

Q. How close did you come to her?

A. I really don't know.

Q. Close?

A. I wouldn't say that close.

Q. Close enough that she needed to jump in order to avoid being hit?

A. Not really.

Q. All right. And you were traveling directly at her at the point at which she jumped out of the way.

A. She was moving across.

Q. Okay. And you were moving at her. Is that right?

A. I guess.

. . . .

Q. And you—and you swerved away from that kind of clerk—course—when you—when you turned in and your headlights saw—you saw the—the pile of shavings. Right.

A. I turned in at sort of an angle like that (indicating). I wouldn't say swerved.

Q. Okay. But you ordinarily did go in at a 90 degree angle. You didn't angle off in the direction of any particular person.

A. Yes.

. . . .

Q. Okay. And on this particular occasion, you didn't proceed in your ordinary way. That's all I'm asking. Isn't that right?

A. Yes.

When asked if Baker appeared startled, Bunch replied by asking what was meant by ''startled.''

On redirect examination, Bunch was asked and testified:

Q. If Mrs. Baker had not jumped back, would your truck have hit her continuing on the course it was on that evening?

A. Not if she kept moving like she was supposed to.

The injunction had required employees picketing the gate to keep walking.

When called by General Counsel, Baker testified:

Well, he turned to me and he had plenty of room to come through and I saw him give a signal to turn in. I stopped so he could come on it and he just changed directions and came at me and I don't know if I run, jumped or what, but I had a hard time getting out of the way and I just threw the flashlight.

JUDGE EVANS: What do you mean by changed directions?

THE WITNESS: He changed the way he was coming in. He changed, you know, when he turned in, instead of him keeping, you know, coming that way, he turned in and drove directly at me.

And I just threw the flashlight. I don't know at what point, I just knew I tried to get out of his way. I threw the flashlight.

Baker was further asked and testified:

Q. When you say you threw the flashlight, did you throw it at the car?

A. I just threw it, you know. I was just scared and I had the flashlight and all I remember is just being scared and trying to get out of the way and throwing the flashlight.

Q. Did you intend to hit his car with the flashlight?

A. No.

Baker testified that she had stopped to allow Bunch to proceed through the gate. Bunch first testified that Baker stood in front of his truck (and tried to make him drive over the shavings); then Bunch testified that Baker would not have been hit by his truck if she had been walking ''like she was supposed to.''

I find that, as Baker testified, Baker was standing in the driveway in order to let Bunch pass. I further find that if Bunch had proceeded at his usual 90-degree turn he would not have driven toward Baker; that he did turn at more than a 90-degree angle and drove toward the point at which Baker was standing; that Bunch's truck would have hit Baker if Baker had not ''jumped out of the way'' (as Bunch's written statement to Bacon, numbered paragraph 6, describes the relative positions of Baker's body and Bunch's truck); and that Baker threw her flashlight at Bunch's truck as he passed. I further find that, as Bunch testified: there was a pile of shavings in the driveway; had Bunch proceeded at the usual 90-degree turn into the plant driveway, he would have run over the pile of shavings; and that the flashlight put a black mark on the truck and inflicted dent above the truck's right-side rearview mirror.

As Bunch described the accident, when he turned into the driveway from Walnut Meadow Road, he saw shavings which may have concealed nails. He had the choices of (1) making his usual 90-degree turn into the driveway and driving over the shavings, (2) stopping until Baker passed by and then detouring around the shavings, or (3) proceeding at an

angle without stopping. Bunch took the last option, necessarily angling his truck toward Baker.

Bunch argued that he was ''not really'' close to Baker, and he argued that Baker would not have been required to jump out of the way had she kept walking ''like she was supposed to.'' However, as Bunch's statement to Respondent admits, Baker was required to jump out of the way to avoid being struck by Bunch's truck. Bunch was evasive when asked if Baker appeared ''startled'' to him, but I find that Baker was startled, reasonably.

Respondent contends that the throwing of the flashlight was deliberate. I do not believe that Baker's action was the product of previous planning. In strike situations, rocks and other articles of no value are sometimes thrown with deliberation, but not things of value, like Baker's flashlight. In strike situations, rocks and other valuless articles may be thrown, but usually not by someone standing in plain view. That is, had Baker preplanned the exercise, she most certainly would have thrown something of less value, and thrown it from a discrete position.

The flashlight hit the truck above a rearview mirror, a point near the front of the vehicle; it did not hit near the rear of the vehicle as it had gone by; therefore Baker cannot be said to acted out of provocation. The flashlight hit Bunch's truck as the truck was coming at Baker; this is necessarily true because Bunch does not contend that the flashlight hit his truck after he swerved away from his line of progress toward Baker.

Finally, the existence of nails among the shavings was not proved, and it cannot be said that Bunch was actually required to chose between his truck's flat tire and Baker's broken bone, torn flesh, or death.

In summary, I find that General Counsel has proved that Baker did not engage in any actions that can be categorized as ''misconduct.''

b. *Eva Blair—Paint remover incident*

Anglin testified that Eva Blair was discharged on the basis of reports of two separate acts of violence on her part. The report considered in this subsection is an oral report by replacement employee Mary Richardson that Blair threw a caustic substance on Richardson's van as Richardson left the plant.

In perfectly credible testimony Richardson recounted an event which happened as she drove her van out of the plant gate; with her was fellow strike replacement Becky DeBoard who did not testify. Richardson testified:

> Now, as—as we come out, okay, we're looking over at the right and there's Eva like this [indicating] and Becky said, ''Oh, no.'' And I looked and I said, ''Who's that?'' And she said, ''Eva.'' And I said, ''You know her?'' And she said, ''Yes.'' And that's how I got her name. I didn't know her personally, but yet—that's how I got her name. But just then, she took the thing and threw it like that (indicating) and it hit the side of the van. Well, both of us was scared. And I said, ''Well.'' We went on up the road, turned around and came back in and we went on the end—there was a security guard standing there and we asked him what to do—that Eva had just thrown—it was like a bulb—like a Christmas bulb ornament is what it looked like—with glassy stuff. And he told us to go on back in and see our supervisor. And, which we did.

Richardson was further asked and testified:

> Q. Now, when Becky DeBoard identified the person she—involved in this incident, did she state her full name, or only ''Eva?''
>
> A. Well, she said, ''That's Eva.'' And I said, ''Eva who?'' And she gave me her last name, Blair, after that.
>
> Q. Okay.
>
> A. And I did ask her. I said, ''Are you sure?'' And she said, ''Yes.'' So, that's how I got her name.

Richardson testified that, after taking pictures of the spot where the the substance had hit her van, she washed it off and ''[i]t just started peeling.''

Blair denied any such conduct.

In summary, Richardson has testified only that someone who was identified to her as Blair threw the substance, and no one has testified that they saw Blair throw the substance. I decline to credit DeBoard's hearsay identification of Blair over Blair's denial. Having credited Blair's denial, I find that General Counsel has proved that Blair was not the person who threw the substance on Richardson's van.

c. *Eva Blair and Carolyn Moberly—rock throwing and threat*

Anglin testified that the second part of the reason for discharging Blair was a report by strike replacements Wilma Chenault and Angela Brannon that Blair threw a rock at Chenault's automobile during the strike. Anglin further testified that Carolyn Moberly was discharged because of reports of four separate acts of misconduct, one of which was a threat Moberly made to Chenault immediately after Blair threw the rock at Chenault's automobile. (That is, this subsection concerns the second of two acts of alleged misconduct by Eva Blair and the first of four acts of alleged misconduct by Carolyn Moberly.)

As mentioned, during much of the strike, the Union maintained a canvas-top camper-trailer in the area of the gate on Walnut Meadow Road in Berea. According to Chenault:

> One day we was—Angie Brannon and I were going out to lunch and as we got to the end of the street, there was a Union trailer on the right-hand side. There was a stop sign. We was making a right and the—there was a rock thrown at the hood of my car.
>
> The rock came by the window—hit the [windshield] and reflected onto the hood of the car.

Chenault testified that she saw the arm of the person who had thrown the rock from the doorway of the trailer; it was the arm of a person wearing a red shirt. Then, as she stopped her car and began to back up (to tell the plant security guard about the incident), she saw Blair and Moberly in the doorway of the trailer; Blair was wearing a red union T-shirt. Chenault and Brannon told the security guard about the incident; the guard told them to go on to lunch and report the matter to Bacon when they returned.

Further according to Chenault:

> So, we went on to lunch and then on the way back from lunch, we had to stop to let a car go by, and as we started to make the left-hand turn to go back into Gibson, she was—Carolyn Moberly was on the picnic table, sitting on the right-hand side and the union trailer was on this side [indicating] and we seen her and we had our windows down and she yelled and said, ''Libby, if I don't get you, I'm gonna get your mommy and daddy.''
>
> Which, it just tore me all to pieces for her to say that because my father had recently got out of the hospital from having open heart surgery, triple by-pass and he's had three strokes. So, he's, you know, an invalid—he has to stay home by hisself. That was a really big threat to me.

Chenault testified that after this statement by Moberly, she noticed Blair; Blair had changed from a red union T-shirt to a black shirt.

The identification of Blair is, again, an issue. Chenault was asked and testified:

> Q. Okay. When the rock hit your car, did Angela say anything to you?
>
> A. She said, ''Libby, stop.'' They said—well, first I said to her, ''What was that?'' And she said it was a rock. And then, at that time, I seen the rock go from the window to the hood of my car and I said—and she said Eva Blair threw it. She seen Eva.

Chenault was further asked and testified:

> Q. Okay. How did you know it was . . . Eva Blair's arm?
>
> A. Because she came on out and I seen her shirt, you know. And I knew Carolyn – Eva Blair through newspapers clippings and she had called my husband [racial epithets], and other verbal language that was just awful.
>
> And we had found out who she was. Then we went to – to Gibson and asked a couple people who was this lady. And they told us it was Eva Blair and then her picture had came out in the paper, you know, of her striking and carrying the signs. And so we knew who she was.

Chenault testified that she had known Moberly for many years, and the ability of Chenault to identify Moberly is not in question.

Brannon corroborated Chenault on all meaningful points. On cross-examination, Brannon was asked and testified:

> Q. And—now, how did you know Eva Blair before that time? Before that particular time?
>
> A. Because she was the loudest one on the line. She made more noise than anybody.
>
> Q. And has anybody—I mean—did she—did she holler, ''I'm Eva Blair?'' Or—
>
> A. No. After we had started working and there was a older employees that had been there and you know—I said something like, ''Does this white woman. . . .'' And I was telling how much noise she made and describe them and they all automatically, ''That's Eva Blair.'' . . . I knew her when I seen her because I came to work every morning and there she was. Every afternoon, there she was.
>
> Q. Okay. But I mean—you described a—a white woman that was loud?
>
> A. Short, curly hair, salt and pepper with a lot of wrinkles in her face.
>
> Q. I see. Okay. And was she the only person there that was—that had curly hair and—and salt and pepper white woman?
>
> A. She probably wasn't, but I'd know her anywhere.

Blair is about 5-feet, 1-inch tall, has grey hair, and Brannon's description of the rock-thrower fits Blair. However, it was not established that Blair was the only striker who fit that description; indeed Brannon admitted that ''she probably wasn't.''

It is obvious that Brannon was relying on the conclusion that had been expressed by unknown, unsworn, individuals at the plant that a person fitting Blair's description could only have been Eva Blair. And Chenault was relying on the identification by Brannon. Chenault also testified that she later had seen a newspaper article with Blair's picture, but this is an identification corroborated by only another piece of hearsay, the newspaper ascription of Blair's name to some picture (that was not placed in evidence).

Again, Blair denied any such conduct, and I decline to credit Brannon's and Chenault's hearsay identifications of Blair over Blair's denial. Having credited Blair's denial, I find that General Counsel had proved that Blair was not the person who threw the rock at Chenault's automobile.

Moberly denied threatening Chenault; however, Chenault could identify Moberly, and Chenault and Brannon were credible in their descriptions of the threat by Moberly. That is, I find that Moberly made the threat to Chenault as quoted above, although I cannot credit the testimony of Chenault and Brannon that Blair was with Moberly when Moberly made the threat, or that Blair was present when the rock was thrown shortly before the threat.

d. *Carolyn Moberly—car chase*

Anglin testified that Carolyn Moberly was discharged, in part, because of a report by strike replacement Sandra Curren that Moberly was in an automobile that had attempted to run Curren's car off a road during the strike.

Curren testified that one day in May, as she turned out of the company gate on Walnut Meadow Road:

> I looked in my rear view mirror and there was a little tan Chevette right up on my bumper, and it had two women in it that wore red T-shirts.
>
> And right at first I didn't think that much about it, and they just kept getting closer and closer and when I got up to the yield sign, they tried to come around me.
>
> Well, there was another truck coming, and they almost hit that truck. So, while they were in their confusion, I took off on down Glades Road. And I got to the—they got behind me again. And I got to the stop sign, and they followed me through the stop sign and went down to the convenience store there—or the Minute Mart store.

> And it's a little ramp you have to go up before you get out on [highway number] 1016, and they come around me on that ramp and try to run me off the road and was—and Carolyn [Moberly] was hollering ''bitch'' to me. . . .
>
> And the other girl [the driver of the Chevette]—I—I really couldn't see her or anything that well. So, I got out on 1016 and they followed me almost all the way home and I finally just ran off to the left and I pulled in the driveway [of my house].

Curren did not know Carolyn Moberly at the time. Curren testified that shortly after she arrived at her home, non-striking unit employee Autumn Barrett arrived. Curren asked Barrett if Barrett would go with her to the area near the plant where the strikers usually gathered to see if Barrett could identify ''these people.''

Curren and Barrett got to the area and, further according to Curren:

> and I said, ''There's the car, sitting right there.'' And it was sitting over in the field. And I said, ''You look and see who it is.'' And she told me it was Carolyn Gay on the passenger side and Linda Shouse on the other side.
>
> And they started hollering names and giving me finger and stuff like that. And I went to work the next day and reported it to Tom Bacon.

Curren testified that when she reported the matter to Bacon he showed her pictures of 50 individuals. She could not identify the driver from any of the pictures, but the one that most looked like the rider in the Chevette was ''Carolyn Gay[7] Moberly.''

Barrett testified consistently with Curren about her post-event identification of Moberly at the picket-line area. There is no question that Barrett, who had been employed by Respondent for 5 years before the strike, knew Moberly and was able to identify her. Barrett was firm in her identification of Moberly as one of the two whom Curren picked out from among the strikers gathered near the plant as having been in the Chevette that had been involved in the incident; however, Barrett testified that the person with Moberly at the point where she and Curren found the strikers gathered was an employee other than Shouse, and that she had never told Curren that the other person was Shouse.

Moberly denied ever being in an automobile that had chased Curren's automobile.

I found Curren credible in her account of what happened as she left the plant. Therefore, the issue becomes: was Moberly properly identified as one of those who participated in the incident? I find that she was.

General Counsel and the Union have, successfully, questioned the ability of some of Respondent's witnesses to identify those allegedly involved in violence. No such question has been raised about the ability of Barrett to identify Moberly when she was pointed out by Curren. Curren was credible in her testimony that, within an hour of the incident, she pointed out the rider in the Chevette to Barrett, and Barrett credibly testified that the person whom Curren then pointed out was Moberly. This is an adequate iden-tification of Moberly as the rider in the Chevette during the event in question. Further, I find no reason to doubt Curren's identification of Moberly from the pictures in Respondent's employee files, and I find Curren's confused naming of Shouse not to be significant.

In summary, I find that the event occurred as described by Curren, and I further find that Moberly was the passenger in the subject Chevette.

e. *Carolyn Moberly, Mary Helton, and Edna Sparks—The Maverick Club incident*

Anglin testified that strike replacements Theresa Broaddus and Brenda Johnson reported to Respondent that they had been physically attacked by Mary Helton, Edna Sparks and Carolyn Moberly at a night club in the nearby town of Richmond. Anglin cited no other reports as the reasons for discharging Helton; Anglin cited the reports of the Maverick Club incident (as it is herein called) as the third of four reports that constituted the basis for the discharge of Moberly, and one of two reasons for the discharge of Sparks. Broaddus, Johnson, Helton, Sparks, and Moberly testified about this incident.

Helton and Sparks are strikingly identical twins. Before this incident Johnson knew neither Helton, nor Sparks, nor Moberly. Broaddus and Helton had known each other for more than a year at the time of the Maverick Club incident, having lived in the same trailer park and having been in each other's homes (albeit only for the brief missions of retrieving children who had strayed).

Johnson testified that on a night during the strike she had accompanied Broaddus to the Maverick Club. The two women were not there for the usual night-club purposes, but to attempt to find Broaddus's ex-husband who was behind on his support payments. They failed to find Mr. Broaddus, and they went to the restroom before leaving.

Broaddus testified:

> So, we [Johnson and she] went to the rest room. There's a rest room in the back. We went in the rest room and came back out. And we're walking past the pool tables and going to go back on out and Mary Helton—she hollered my name at me. And then her and her friends that were sitting there with her, all came towards me and were, you know, calling me various names.
>
> And I tried to leave, and they just pushed me back, pushing me down into a chair and we stayed there and then I tried to get up and they pushed me back down. I had somebody pulling my hair and smacking me and Brenda—she had walked on ahead of me because it's

[7] Moberly identified herself as ''Carolyn Joyce Moberly'' when she testified. Broaddus, in testifying about the Maverick Club incident, as discussed below, while also referring to Company identification pictures, also referred to her attacker as ''Carolyn Gay Moberly.'' However, there is no explanation for the reference to ''Gay'' in the record. Barrett knew Carolyn Moberly and identified the person whom Curren called ''Carolyn Gay'' as Carolyn Moberly. There is no other ''Carolyn Gay'' involved, or even another woman named ''Gay.'' Therefore, I find that both Curren and Broaddus were identifying Carolyn Moberly when they referred to ''Carolyn Gay'' or ''Carolyn Gay Moberly.''

like a small aisle—you have to go single file. So, she didn't know where I was.

And I guess the bouncer, whatever, noticed the commotion going on and he was coming to the back there. Brenda turned around and seen me back there and she started coming towards me and then they seen her and stopped her. And I think some of them went toward her and had a few things to say to her.

Then the bouncer put Brenda Johnson and I out the back door. There was a back door right there. And he pushed us out the back door. And we was running to the car. They all run out the front door while we were trying to get to the car. And then we left. That was it.

Broaddus testified that three of the individuals who ''were all pushing at me and pulling my hair'' were Helton (whom she knew from the trailer park), Sparks and Moberly. Broaddus testified that she had never seen Sparks before, but she remembered Sparks' appearance and could later pick her out from among Respondent's photographic identification cards of employees. In regard to her identification of Moberly from the company identification photographs, Broaddus was asked and testified:

Q. Okay. Did you identify anyone else involved in the incident?

A. Yes. Gosh, I can't think of the name. Was it Carolyn Moberly? Is that the name?

Q. Do you know—you have to testify to the best of your recollection. Is that the best of your recollection?

A. Yes.

Q. Do you know Carolyn Moberly by another name?

A. Carolyn Gay. Carolyn Gay.

Broaddus testified that ''They were all telling me not to go back to work at Gibson and if I did, I'd be sorry. And calling me scab—.'' Then she testified that she could not tell who among the group had said what, except that Helton said, ''Theresa, you're taking the food out of my kids' mouth,'' and ''Don't go back to work there.''

Broaddus testified on cross-examination that during the incident, someone hit her in the eye, and left a mark, but she could not remember who it was. On redirect examination, after being shown the pretrial statement she had given Respondent, Broaddus testified that the person who hit her in the eye was Moberly.

Johnson testified:

[Broaddus and I] had started to leave and we were walking out and I thought she was behind me because it was crowded and it was kind of single file where we were. I thought she was right behind me.

I got about to the sound booth, and turned to say something to her, and didn't see her. That's when I first realized she wasn't with me. . . . Well, I was trying to find her—I mean—by looking. It's real dark in there. And I finally spotted her and she was backed up against the wall. There were four women on her. They were—she was sitting down. She tried to get up. They pushed her back down. There was a punch thrown. I don't know who threw what.

Johnson testified that two of the women who were ''on'' Broaddus ''looked a lot alike.''

Further according to Johnson:

And I started back toward [Broaddus,] and there was one woman had got to me and was screaming at me. And it was hard to make out what she was saying. I didn't know what she was saying. I think she was saying, ''You're a scab.''

And she pushed me. I pushed her back. And then we [Johnson and her assailant] had made a few steps back toward the back of the building, back toward [Broaddus]. And the crowd that [had been] around her [Broaddus] was [then] around me.

Johnson testified that she could not identify the woman who had pushed her. However, Johnson testified that she later identified, from company identification photographs, Moberly and Helton as being two of the four women that had been ''on'' Broaddus and thereafter approached her. Johnson testified that when the group approached her, Moberly and Helton pulled her hair, and someone in the group yelled that they would burn her house down and that she should not go back to work.

Johnson agreed that a bouncer ejected her and Broaddus.

Helton testified that she went to the Maverick Club on the night in question with her boyfriend. During the evening she walked toward the bathroom and met Broaddus and Johnson (whom she did not know) as they were leaving the bathroom. Helton engaged in a conversation with Broaddus; Johnson stood with them, but said nothing.

On direct examination, Helton was asked and testified:

Q. Could you tell us from the beginning of the conversation to the end what you said and what Theresa said?

A. Well, when I came upon her, passing through the hallway going to the bathroom, she said, ''Mary,'' cause she knew me. And I stopped and I said, yeah, and she started apologizing for working at Gibson.

She said, I'm sorry I went into Gibson. And she started making all kinds of excuses, the reasons that she went into Gibson.

Q. What were the excuses?

A. Like, I need to work, you know. And I told her, I need to work, too. And that, because our kids were friends, she said she didn't want the kids, you know, to fall apart over it.

And I said, well, that's left up to the kids. That I didn't want no apology.

. . . .

Q. What did you do at the end of this conversation?

A. Well, everybody started, we was walking away to get back—I noticed everybody was standing around watching, so I just went on to the bathroom and she went on wherever she was going.

Q. You say everybody else. How many other people were around?

A. There were probably ten or fifteen people around standing.

Q. Okay. Was there anybody you knew standing around at that time?

A. No.

Q. What, were your voices raised or anything in this conversation?

A. Well, the band was playing, people's voices were loud. We was probably talking loud so we could hear each other.

Q. After you went to the rest room, what did you do?

A. Well, after I went to the rest room, I came back to my table.

Helton testified that after she spoke to Broaddus, she went into the restroom and saw Moberly. She told Moberly of the exchange with Broaddus. About 30 minutes after she left the restroom, further according to Helton, she saw the club bouncer ejecting two women out the back door, one of whom was Broaddus.

Helton denied any type of altercation or argument with Broaddus and Johnson, denied touching either one of them, and denied seeing any type of fight that night at the Maverick. Helton denied seeing Moberly that evening, except in the restroom. Helton denied seeing Sparks, her twin sister, at all that evening.

On cross-examination, Helton admitted that in a deposition given in August 1989, within weeks after the Maverick incident, she testified that on the evening in question,[8] she saw Moberly and Sparks sitting together at the same table, and she ''probably'' talked to both of them, although she states in the deposition that she did not recall. When taken on redirect examination, Helton testified that she did not know whether she had seen her sister that evening.

Finally, Helton was asked why 10 or 15 people had stood around while she and Broaddus had a conversation. Helton replied: ''Because we was standing there talking and the walkway is narrow and they couldn't get by us and they was coming and standing.''

Moberly testified that she had gone to the Maverick with Sparks on the night in question. She had been there about an hour when she went to the restroom, and she saw Helton as she got close to the door. Moberly testified that Helton ''said that there was scabs in there,'' and that ''she had a few words with them.'' Helton did not tell Moberly what the ''words'' were or anything else about what had happened. Moberly testified that Helton said nothing about there having been any kind of fight that evening, and that she witnessed no type of fight herself. Moberly denied knowing Broaddus; she knew Johnson but she denied seeing Johnson at the Maverick that night, and she specifically denied hitting Johnson.

Sparks testified that she went to the Maverick with Moberly three times during the strike, and that one of the times was in June when the fight is alleged to have taken place. On that evening Moberly said nothing about being involved in a confrontation with any strike replacements, that she did not know Johnson or Broaddus, and was not involved in any type of fight or confrontation with anyone that night (or at any other time at the Maverick).

Sparks denied seeing Helton that evening. She testified that Moberly told her (Sparks) that Moberly had seen Helton in the restroom that evening and that Moberly further told her that Helton had said to Moberly that Helton had seen two replacements ejected from the club earlier in the evening.

Helton agrees with Broaddus that Broaddus and someone else was ejected from the Maverick Club. Broaddus and Johnson agreed that it was Johnson that was ejected with Broaddus, and there is no reason to doubt this testimony. Broaddus and Johnson were ejected for some reason.

Helton testified that she had no more than a civil, albeit less-than-cordial, exchange with Broaddus. Helton further testified that she and Broaddus talked no louder than required to be heard over the night club's music. But Helton also testified that ''everybody was standing around watching.'' Helton estimated that ''everybody'' was 10 or 15 people. Helton attempted to explain the existence of an audience by the fact that the passageway was narrow and people wanted into, or out of, the restroom.

When people want to pass by, they say ''excuse me,'' and that usually gets them by. But in this case, the people didn't say ''excuse me'' because they did not want to get by; they wanted to stop and listen to the exchange that was being conducted at a volume that was extraordinary, even for a night club. That is, people were standing around, watching and listening, because there was something unusual to watch and to listen to. What there was to watch and to listen to was not Broaddus apologizing to Helton. It was the beginning of a verbal, then physical, assault.[9]

While it is impossible to precisely choreograph such a confrontation in retrospect, I believe, and find, the following: As Broaddus and Johnson came out of the restroom, they became separated by the crowd. Helton saw Broaddus and confronted her. Johnson kept walking. As the confrontation at the restroom entrance grew louder, Moberly and Sparks, and another woman (whom neither Broaddus nor Johnson could identify), came to help Helton by pushing Broaddus down in a chair, ''smacking'' her, and pulling her hair.[10] When Johnson realized what was going on, she turned to assist Broaddus. When Johnson did so, the group jumped on her, pulling her hair and yelling at her, as described by Johnson.

I find that Sparks, Helton, and Moberly were credibly identified as three of the four individuals who accosted Broaddus and Johnson. Broaddus knew Helton. Johnson could testify, as she did, without knowing either Sparks or Helton, that ''there was two women that were on [Broaddus] that looked a lot alike.'' I further found credible the testimony of Broaddus that three women, two of whom were Sparks and Helton, pulled her hair in the confrontation. Broaddus had difficulty remembering which of the four women punched her in the eye, but it does not matter; Moberly was identified by Broaddus and Johnson from company identification photographs as being in the group that assaulted Broaddus and Johnson at the Maverick Club. Moreover, I agree with Respondent that Broaddus' identifying Moberly as the one who hit her in the eye, only after being

[8] General Counsel argues that it is not clear that Helton knew which was the evening in question at the time she gave the deposition. Criminal charges had been filed against Helton by the time she gave the deposition, and Helton knew very well what evening she was being asked about, whether she had engaged in misconduct or not.

[9] Of course, the nonpaying participants, Broaddus and Johnson, were the ones who were ejected by the bouncer, no matter what had happened before.

[10] Sisters Helton and Sparks necessarily fabricated the story that they had not even seen each other at the Maverick Club at some point after Helton gave her deposition.

shown the statement that she had given Respondent shortly after the incident, demonstrates that Broaddus was testifying from candor, not an intent to ''get'' Moberly, or for any other invidious or irrelevant consideration. I believe, and find, that it was Moberly who hit Broaddus in the eye during the Maverick Club incident.

f. *Carolyn Moberly—picket line threats*

In addition to her description of the Maverick Club incident, Johnson's written statement to Respondent included the following paragraph upon which Anglin testified that he relied in discharging Moberly:

> 8. Subsequently [to the Maverick Club incident], when I would be driving through the picket line going to and coming from work at Gibson, Carolyn Moberly would regularly yell ''We're going to get you.''

During her testimony about the Maverick Club incident, Johnson was asked if she saw any of her assailants after the incident. She identified Moberly as one who would ''just yell things, you know, 'we're going to get you.'''

Moberly generally denied threatening anyone when called on rebuttal; however, I found Johnson credible on the point.

g. *Edna Sparks—invitations to fight*

In addition to reference to the Maverick Club incident, Anglin testified that, in discharging Sparks for strike misconduct, he relied on reports by plant industrial engineer John Hunter that ''Edna continuously invited re-placement workers out of their cars to fight.''

Hunter testified about alleged misconduct of Dianne King, as discussed below, but he did not testify about any alleged misconduct on the part of Sparks.

However, although Sparks was called by General Counsel to testify about the Maverick Club incident, she was not asked about inviting replacement workers out of their cars to fight. Therefore, General Counsel has not proved that Sparks did not engage in this misconduct which Anglin cited as part of the basis for Sparks' discharge.

h. *Diane King—car-scratching incident*

Anglin testified he discharged Diane King because of two reports of misconduct by King.

The first incident involved an alleged scratching of the automobile of striker replacement William Collins. Collins was called by Respondent and testified:

> One day I was coming to work—it was close to 7:30 and I was about three cars back from where you turn into Gibson. And there were three ladies coming up to the car and starting hollering, you know, certain things at me.
>
> And when it come my turn to pull up to turn in, then they started, you know, kind of moving away and one of them turned and walked back toward the rear of my car and I heard something rake across the back of my car.
>
> And I knew then that something had happened. So, I turned on in and, [after viewing a new scratch on his automobile], went into the building and reported it to [plant industrial engineer] John Hunter. Where he took me back out to the gate, and I made an incident report to Office Bernie Harris of the Berea Police Department.

Collins testified that he, Harris and Hunter went to the area across Walnut Meadow Road where the strikers had gathered. He pointed out the woman who had walked toward the rear of his car and produced the scratching noise, and scratch. Hunter stated to Collins that the woman whom Collins had pointed out was Dianne King.

Hunter testified that he had known King for several years, and he credibly testified that the person whom Collins pointed out was, indeed, King.

King denied scratching any automobile, Collins' or anyone else's.

General Counsel and the Union argue that Collins could not have identified Collins accurately because, inter alia, Collins did not see the face of the individual doing the act as it was done, and Collins could not see the hand of the individual who walked toward the rear of the car as the sound was being produced.

Collins got a good look at the women who had accosted him as his automobile was stopped to make a turn into the plant. He was able to see which one of the women turned and he was able to testify that the scratching sound began as she did so. It was on the same day that he identified that person to someone who knew her, Hunter.

I find this identification sufficient to conclude that King caused the scratch, which was about 18 inches long, on Collins' automobile.

i. *Diane King—invitations to fight*

Anglin testified that King was discharged, in part, because of oral reports by Supervisor Cindy Lewis that King had cursed her and ''she was constantly inviting her out of her car to fight.'' A specific threat about which Lewis informed Anglin, according to Anglin's testimony, was ''if you get out, I'll need five minutes with you.''

Lewis did not testify. However, King was not asked about any threats to Lewis when she testified. Therefore, I find that General Counsel has not proved that this alleged misconduct by King did not occur.

j. *Terry Lear—car scratching*

Anglin testified that Lear was discharged upon reports by Rick Moberly[11] and Robin Broughton that Lear had scratched an automobile driven by Moberly (but owned by Moberly's brother).

Moberly testified that one night during the strike his brother's automobile was scratched as he drove it though the picket line at the plant. According to Moberly:

> I was working second shift. And we got off of work at 12:30. And went outside the plant and got in my car. It was my brother's car. It's an IROC, 1988. It's about three months old, four months old, I think. And got in the car, started up, and Robert Foster was with me. He was on the passenger's seat, in the front seat.

[11] The record does not disclose whether Rick Moberly is related to Carolyn Moberly.

> And Robin Broughton was in the back, passenger seat on the right. And so we was—started to leave the plant. As we headed down to the main road, I had to stop, let the people who was on strike go in front of the car. Then, you know, I was leaving. They was coming back across. And so I took a right on that road there and left the plant.
>
> I think about half way down, or near the four-way stop, Robin mentioned that she thought somebody had scratched my car—or my brother's car, really. And so, got to the four-way stop, stopped there, proceeded straight across, and I think there's a Berea Maintenance Department on the left as we went straight across there.
>
> I got outside, and checked the car out and I think there was a scratch—I know there was a scratch on the right side of the car. And so, we got back in the car.

Moberly testified that he, Broughton, and Foster returned to the picket line to get a second look at those who were in the area. Broughton saw the person whom she thought had done something to the car and assured Moberly that she could identify that person later. Moberly knew where he could then find supervisor Harold Pruitt, and the three employees, in Moberly's brother's car proceed to go to that point. When they found Pruitt, Broughton, further according to Moberly, described to Pruitt the individual whom she thought had done the damage: a man at the picket line who had a beard, who wore glasses, and who wore a flannel shirt. Moberly testified that Pruitt told Broughton and him that the description that Broughton gave fit Lear.

On cross-examination Moberly admitted that the scratch on his brother's car, which was 2 feet long and down to the metal, could have been made as much as a week before the incident in question. Moberly also admitted that the radio of the automobile was playing only moderately, but he heard nothing before Broughton spoke.

Lear denied ever having scratched the Moberly car.

Neither Broughton, nor Foster, nor Pruitt testified, and the proposition that Moberly's automobile was scratched when it proceeded through the picket line rests on the hearsay statement, indeed speculative hearsay, by Broughton; Moberly testified that Broughton said that she *thought* that someone had done something to the car at that time. The hearsay is even more suspect in this case because Moberly admitted on cross-examination that the damage could have been done as much as a week before the individual, speculated to be Lear by Broughton, was near the area of the automobile.

To the extent that Moberly's testimony was offered to establish that the automobile was scratched as he drove it across the picket line, I discredit it. An ''IROC'' is a very small car, but even in an average-size car any contact that would produce a two-foot scratch, down to the metal, would have been heard in the passenger compartment. (As Collins testified, when his car got scratched, ''I knew then that something had happened.'')

Assuming that the damage was done to the automobile when Moberly drove it across the picket line, the identification of Lear further rests on Broughton's speculation that a person with a beard and glasses could have done it. Assuming further that a person with beard and glasses scratched the car, the identification of Lear rests on the further hearsay identification, indeed speculative hearsay identification, by Pruitt. Pruitt's hearsay statement to Broughton and Moberly that the general description that Broughton gave him fit Lear is only that, and nothing more: the description fit Lear. The statement could not establish that Lear did anything. Pruitt did not go to the picket line to have the ''perpetrator'' pointed out to him, on that night or any time later. Even if Pruitt had been brought to the picket line, the only person who could have been pointed out to him would have been the one whom Broughton had speculated, out of court, to have done some damage.

This speculative hearsay upon speculative hearsay cannot be credited against the clear denial by Lear.

Accordingly, I credit Lear, and I find that General Counsel has proved that Lear did not commit the strike violence attributed to him by Respondent and allegedly used as the basis for his discharge.

k. *Carl Long—Threat to Hensley*

Anglin testified that he discharged Long on the basis of reports by employees Mitchell Hensley and Timothy Matthews that Long had threatened them with violence because of their working as strike replacements.

Alleged threat to Hensley

Hensley was called by Respondent and testified:

> Well, there was an incident that I had with Carl Long in Richmond, Kentucky. [My wife and I] were sitting at a stop light next to Ernie & Joe's Liquor, and Carl Long was coming out of the liquor store and it looked like he was kind of like staggering. And he got into his car and we was still waiting at the light for it to change.
>
> And he pulled up beside us, passenger side. And he started hollering, ''Hey, scab. Where's your momma?'' And ''Why don't you get out of the truck?'' Stuff like that. And at that point in time, my wife was pregnant and I just had a fear that, you know, something was going to happen.
>
> So, she locked her truck door and I locked I door and we [waited] for the light to turn green and as we were going out, when the light turned green, he said he was going to get me.

Hensley's wife was not called by Respondent. Long denied having asked Hensley to get out of the truck, and he denied threatening to ''get'' Hensley.

Long acknowledged confronting Hensley and his wife, but he denied telling Hensley that he would ''get'' him. Respondent argues that Long should be discredited because, in a pretrial deposition he also denied asking Hensley where Hensley's ''momma'' was during the confrontation, although, at trial, Long admitted having asked Hensley that question.

Long was given an opportunity to explain his denial of the reference to Hensley's mother in the deposition, but he was unable to do so, other than to offer the implausible explanation that he did not understand the question that had been put to him in the deposition.

The reference to Hensley's mother was not insignificant. Long was obviously trying to humiliate Hensley by referring to Hensley's mother as one to whom Hensley should report;

and he did it in the presence of Hensley's wife, aggravating the insult. Although Long is about 20 years older than Hensley, he is obviously the physically superior. I find that the taunting by the physically superior man did not stop with the reference to Hensley's mother. It continued with the further attempt at humiliation, the statement that he would ''get'' Hensley and asking Hensley why he did not get out of the truck, as Hensley credibly testified.

l. *Carl Long—threat to Matthews*

Anglin testified that he received a written report from strike replacement Timothy Matthews that Long had threatened him during the strike. Long denied the threat, and Matthews was not presented as a witness by Respondent.

There being nothing upon which to discredit Long's denial, I find that General Counsel has proved that the alleged threat did not occur.

m. *Melvin Pennington and Gary Spires—convenience store incident*

Anglin testified that strikers Pennington and Spires were discharged upon a report by Tim Matthews that Pennington and Spires had threatened Matthews at a convenience store. Pennington and Spires denied the threats and other conduct attributed to them in the report, and, as noted, Respondent did not present Matthews as a witness.

There being nothing upon which to discredit the denials by Pennington and Spires, I find that General Counsel has proved that the alleged threats to Matthews by Pennington and Spires did not occur.

3. Alleged threats or violence by nonstrikers

General Counsel adduced evidence of violence, or threats of violence, by nonstrikers. In so doing General Counsel was attempting to show that strikers who were discharged for violence or threats were treated discriminatorily.

Nonstriking employee Maudie Alexander drove through the picket line, at least once, with a gun displayed on the dashboard of her car. Anglin and Bacon were informed of the event shortly after it happened. No discipline was taken against Alexander. The only action that was taken by Respondent in regard to the matter was, as described by Bacon:

> We passed on what the Berea police told us—they couldn't be, as far as the legal aspects, like keep it under the seat, but have a portion of it visible.

Blair testified that ''day after day'' Alexander drove through the picket line with a gun on her seat. Presumably, this was after Bacon instructed line-crossing employees to ''like keep it under the seat.''

Blair and striker Cecil Thacker credibly testified that on one occasion when supervisor Pruitt was driving through the picket line, he slowed or stopped to show them a gun which he had in his vehicle.

On August 19 Curren, who, as mentioned, had worked during the May 1 to August 8 strike as a replacement, confronted Loretta Centers and Carolyn Moberly when the former strikers were sitting in Center's automobile at a convenience store. Curren cursed and threatened both Moberly and Centers, and tried to get Centers to step out of her car to engage in a fight. By kicking or some other means, Curren damaged Center's automobile. Curren was convicted of terroristic threats and ordered to pay restitution for the damages to Center's automobile.

Respondent knew of the Curren-Centers incident as early as August 25 when counsel took a deposition of Moberly. Moberly named Sandra Curren as ''Sandra Conner,'' but she also named four other employee-witnesses who could have given the correct name, assuming that there had been some confusion about the matter. At some point during the fall of 1989, Curren also told Bacon and Human Resources Director Dombrowskes about the incident and her conviction, although she denied being guilty of any criminal offense.

Respondent did not investigate the matter, and Curren was not disciplined. (Curren was fired by Respondent, but a year later, and for absenteeism only.)

III. ANALYSIS AND CONCLUSIONS

A. *The 10(b) Limitations Issue*

Section 10(b) of the Act provides that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .'' Respondent argues that all allegations that unfair labor practices occurred in May are barred by this provision of the Act. This issue must be decided to determine if any of the alleged May conduct by Respondent can be made the basis of a finding of a violation, and, if so, whether certain of those May unfair labor practices, the May 1 letter and Respondent's bargaining tactics, prolonged the strike, as alleged.

The May allegations of the complaint are supported by a charge that is timely filed within Section 10(b) if they are closely related to and grow out of the timely filed allegations in the original charge. The Board states in *Roslyn Gardens Tenants Corp.*, 294 NLRB 506, 506–507 (1989);

> In determining whether otherwise untimely filed allegations are barred under Section 10(b) of the Act, we examine the newly alleged violations to determine whether they are ''closely related'' to and grow out of the violations timely alleged in the charge. In applying the ''closely related'' test to those violations alleged here, we examine the following factors: (1) ''whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge'' (i.e., whether they involve the same legal theory and usually the same section of the Act); and (2) ''whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge; (i.e., whether they involve similar conduct, usually during the same time period, with a similar object).[5]

[5] *Redd-I*, 290 NLRB 1115, 1118 (1988). See also *NLRB v. Dinion Coil Co.*, 201 F.2d 275 (D.C. Cir. 1952), and *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). The Board may also look at whether a respondent would raise the same or similar defenses to the new allegations.

Respondent contends that the complaint's allegations of May misconduct are not ''closely related'' to the allegations of the original charge; indeed, Respondent contends that the allegations are, in fact, inconsistent.

Addressing Respondent's broader argument first, it is to be noted that Respondent does not state in what regards there lie inconsistencies between the original charge and the complaint. Respondent cites a case in which a charge of an insistence on representation was juxtaposed with a complaint that alleged a refusal to represent; Respondent cites a case in which there was a narrow charge at one location but a complaint containing broad allegations of misconduct at several locations (and even a different employer); and Respondent cites a case in which a complaint had issued on an unlawful layoff and failure to recall when there was a timely charge only in regard to the failure to recall. Respondent points to no such radical inconsistences here, but only offers conclusionary statements on brief that similar radical inconsistencies between the charge and the complaint exist.

I find that the allegations are not inconsistent; indeed, I find that they are ''closely related'' within the meaning of the cases cited above.

Paragraph 6(a) of the complaint alleges that, by Anglin's May 1 letter, Respondent ''threatened employees that they would have the right to work for Respondent only if they abandoned the [May 1–August 8] strike and returned to work prior to their being replaced.'' The original charge alleges that ''The employer also made unlawful statements to striking employees regarding their replacement and/or reinstatement.'' Both statements are allegations of 8(a)(1) violations, and both do, or would, include an unlawful threat to disregard reinstatement rights under *Laidlaw* or *Mastro Plastics*,[12] depending on proof that may be adduced. Certainly, the same fact situation is involved; there was no other strike, or statement, that the charge and complaint could have been referring to. There is no difference in any factual defense that would be asserted; in fact, there are no factual issues because Respondent admitted that Anglin sent the letter.

Paragraph 6(c) of the complaint alleges that Respondent ''solicited employees to withdraw from the Union and assisted them in submitting union withdrawal letters.'' The original charge alleges individual bargaining and solicitations to abandon the strike. Both allegations concern Respondent's contact with strikers and and alleged attempts to thwart the strike through individually directed unlawful efforts by Respondent. Respondent was advised, by service of the original charge, that these contacts were being brought into question, and Respondent was never given reason to believe (by the amended charge or otherwise) that those contacts were being dropped from scrutiny. The factual defense would be the same; Respondent, by either allegation, would have been required to come forward with evidence of what the nature of the contacts had been. Finally, the charge, albeit in ''boilerplate,'' concludes:

> By the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act[.]

If ever this standard language is to be held to mean anything, it means that a theory of attempts to secure abandonment of union membership falls within an allegation of an attempt to secure abandonment of a union strike. Employees who abandon a strike and continue to work, and do not abandon their memberships, may be lawfully fined by their union,[13] a fact that Respondent repeatedly emphasized to returning strikers.

The final May allegation of the complaint is paragraph 13 which alleges that Respondent conditioned continued bargaining on the abandonment of the strike or execution of the waiver. The original charge alleges that Respondent ''on or about April 29, 1989, punitively . . . refused to bargain with the Union because the employees announced their intention to strike.'' The form of the retaliation in the original charge (retaliatory withdrawal of proposals) is different from the form of the retaliation specified in the complaint (retaliatory refusals to meet), but the fact sequence, and the ultimate theory, that Respondent was attempting to thwart effective bargaining by its tactics, is the same. And, again, if the ''By the above and other acts'' boilerplate means anything, it means that a course of retaliatory bargaining would be investigated by General Counsel. Finally, Respondent's proof is not different; under either allegation, it would be required to defend its tactics in bargaining.

Accordingly, I find and conclude that the May allegations of the complaint are based on a charge that was timely filed within Section 10(b) of the Act.

B. *The Unfair Labor Practice Strike Issue*

1. Unfair labor practices alleged as prolonging strike

The complaint alleges that the May 1 letter and Respondent's bargaining demand which was first asserted on May 15 converted the strike from economic to unfair labor practice.

a. *Respondent's May 1 letter*

Two days before the strike began Respondent placed a advertisement in the local papers that assured potential replacements:

> Accepting 400 applications because of possible labor dispute. . . . Your right to work is protected by Federal and State Law.

Conversely, Anglin, by the letter of May 1, warned actual, or potential, strikers:

> We will begin to hire and train new employees immediately so you should understand that you have a right to work here which is protected by federal and state law *if you return to work before you are replaced.* It really is up to you. [Emphasis is in original.]

In *Hicks-Ponder Co.*, 186 NLRB 712, 725 enfd. 458 F.2d 19 (5th Cir. 1972), the Board found that the employer violated Section 8(a)(1) by telling employees in a speech that it had the right to fill the jobs of the economic strikers, and when the strike was over those whose jobs were filled while they were striking automatically lost their rights to work or get their jobs back. In this case the coercive nature of Respondent's May 1 letter is even stronger: Anglin put the threat to ignore the employees' Laidlaw rights, in writing; he underlined the threat to prevent any employees' missing the

[12] *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1956).

[13] *Machinists Local 1414 (Neufeld Porsche-Audi),* 270 NLRB 1267 (1984).

point; and he concurrently published a notice in the newspapers that the rights of replacements would be respected.

In sum, by Anglin's letter, Respondent threatened to ignore the reinstatement rights of strikers under the Act, and by doing so Respondent violated Section 8(a)(1) of the Act, as I find and conclude.

b. *Respondent's May 15 and 21 demands*

As quoted above, the complaint alleges that on May 15 and 21, as a condition for continued bargaining, Respondent demanded that the Union stop the strike or execute a waiver of any contention that the strike was protected only because Respondent had not given telegraphic notice that the strike was unprotected.

The first issue is whether there was such a demand, or was there only a request, as Engeman argued as he testified.

When the parties met on May 15 and 21, no contractual terms were discussed. The only discussion revolved around Engeman's demands that the strike stop, or that the waiver be executed. When Hartman asked on May 15 if Respondent were there only to make such legal arguments, Engeman replied only with further legal arguments. When the parties met on May 21, Engeman informed Hartman, by letter dated May 18, that Respondent was willing to negotiate ''immediately upon your discontinuing [the strike]'' or executing the waiver. Again, no negotiations concerning the terms and conditions of employment of the employees took place.

After the meeting Hartman wrote Engeman and restated a waiver that he had delivered to the mediator at the May 21 meeting. In the letter, Hartman uses the word ''request.'' From this, Respondent argues that it had made only a ''request'' for a waiver, not a demand.

Respondent's position in this regard turns upon Hartman's polite, or facesaving, employment of the word ''request.'' However, it is clear that no negotiations were going to occur, and no negotiations did occur, until Engeman got the waiver. In this context, there was a demand, and nothing short of it.

The legal issue is whether Engeman's demands violated Section 8(a)(5). I find that it did.

Engeman premised his May 15 and 21 demands upon the no-strike clause and his interpreted extension of that clause by Section 13 of the expired contract. However, Section 13 is premised on the continuation of negotiations. Here, there were no negotiations scheduled at the time the strike began, as Respondent admits. Therefore, Respondent's contention that the no-strike clause was somehow extended by continuing negotiations is patently false.

A refusal to bargain premised on a false assertion is necessarily a refusal to bargain in good faith. The bad-faith nature of the demand is especially clear in this case. Respondent knew that the Union was intending to strike on May 1; Engeman told Hartman on April 28 that the Union had Respondent's best offer ''unless you strike''; on April 29 and 30, Hartman told Engeman and Tudor that the strike would begin on May 1; neither Engeman nor Tudor said anything about a possible contract violation. Engeman testified that he really had not believed that a strike would occur. The false nature of this testimony is demonstrated by Respondent's prestrike placing of advertisements for strike replacements and the hiring of a security service because of feared violence. In the 11th-hour conversation between Hartman and Engeman, Engeman did not question Hartman's statement that the strike was about to start; and Engeman did not suggest further negotiations. Instead, Engeman only mentioned *strikers'* rights to continue their insurance coverage. Respondent did not mention the possible contract violation until May 15. Engeman testified that he withheld the statement of his position because he wanted to do it face-to-face. Engeman had ample opportunity to present his contention face-to-face at the May 28 session. He did not do so. I find that Engeman did not present the contract violation theory on April 28, or at any time thereafter until May 15, because he had not thought of it until after the strike began. As noted, Sweeney admitted that the issue was not discussed by Respondent's principals until ''within a day or two after the strike actually commenced.''

In summary, the position that the May 1 strike somehow violated the expired contract was no more than an afterthought, and not one taken in good faith. It follows that the Respondent's demands that were premised on this disingenuous position were made in bad faith, and Respondent's continued insistence on the bad faith demands interrupted bargaining from May 15 through 30.[14]

Accordingly, I find and conclude that Respondent violated Section 8(a)(5) by unlawfully delaying bargaining from May 15 until 30.

2. Strike conversion issue

Economic strikes are not automatically converted to unfair labor practice strikes upon the commission of unfair labor practices during the strike. Whether a strike will be held to have been converted depends on the nature of the unfair labor practices committed during the strike and whether it has been shown, or can be inferred, that the unfair labor practices caused prolongation of the strike. See *C-Line Express*, 292 NLRB 638 (1989), and cases cited therein.

In this case there is testimony by a few strikers that they were distressed by the Respondent's May 1 letter that emphasized that they would lose their rights to reinstatement if Respondent replaced them before they abandoned the strike. However, none of the employees suggested that they collectively, or individually, determined that they would need to stay out on strike, even if the economic issues were resolved, because of the letter. Additionally, on May 15 and 21 Hartman told the employees that Respondent was declaring the strike ''illegal,'' and this distressed some employees, but, again, no striker (or Hartman) testified that the refusal to bargain was even discussed as a basis for continuing the strike. Finally, the Union used about 24 different picket sign legends, none of which indicated that the strike was, in any respect, being continued because of the unfair labor practices; and the Union argued its case in the newspapers, none of which carried any statement that unfair labor practices were part of the reason for the strike.

Such a failure of evidence was determinative in *Christopher Construction Co.*, 288 NLRB 1275 (1988), where the employer not only threatened to discharge strikers, it did it.

[14] Respondent argues that holding a position in good faith cannot be bad faith; however, Respondent suggests no way that Engeman could have asserted, in good faith, that the negotiations were continuing when the contract expired on April 30. Negotiations simply were not continuing at that point, and Respondent does not suggest that they were.

The allegation that the strike had been converted to an unfair labor practice strike was dismissed upon the judge's consideration of the fact that: ''The record contains no evidence that the strikers ever discussed the discharges or that they ever concertedly considered the discharges a reason to prolong the work stoppage.''[15] In this case, there is no allegation that the May 1 letter constituted as a discharge, thus rendering General Counsel's contention even weaker than the one made in Christopher Construction. Accordingly, I reach the same result, and find that the strike was not converted to an unfair labor practice strike because of Respondent's May 1 letter.

The unfair labor practice of May 15, however, stands on a different footing. The comprehension or resolve of the employees is irrelevant. The demand interrupted bargaining from May 15 through 30 as no other topic could be addressed until Respondent's demand was satisfied.

Respondent withdrew its demand that the strike cease, or the waiver be executed, only when it got one of its proposed alternatives, the waiver. From May 15 through 30, negotiations were stalled over Respondent's bad-faith insistence on one of those alternatives, because, at the May 15 and 21 sessions, Respondent refused to discuss anything else. That is, Engeman testified

> My plan was to do exactly what I did, which was to raise it. If it caused a settlement, then fine. If it didn't cause a settlement, I was going to get it off the table and I got it off the table.

However, Engemen did not get his contention ''off the table'' when its spurious nature was pointed out by Hartman on May 15. Engman left it ''on the table'' for two weeks, while negotiations were being tactically stalled and strikers were being replaced.

Therefore, whether the striking employees even knew of the fact (which they did), the negotiations were stalled because of Respondent's unfair labor practice of May 15, just as much as if Respondent had conducted an outright refusal to meet during that period.[16] Respondent resumed bargaining on May 30 (because it had gotten what it wanted), but the cessation of the unfair labor practice does not divest the strikers of their status as unfair labor practice strikers; the unfair labor practice of May 15 tainted the bargaining climate and impeded and delayed the opportunity for settlement of the strike, whether or not a contract would have been reached without the unfair labor practice. *Yearbook House*, 223 NLRB 1456 (1976).

Accordingly, I find and conclude that the May 1 strike was converted to an unfair labor practice strike on May 15.

C. *Refusals to Reinstate Strikers*

1. Effect of the 10 discharges

I have found that General Counsel has proved that Darcus Ann Baker, Eva Blair, Terry Lear, Melvin Pennington, and Gary Spires did not engage in the misconduct attributed to them. Because the conduct that was attributed to them was taken in the course of protected activity, the strike, their discharges violated Section 8(a)(1) and (3) of the Act, as I conclude, even if Respondent had held a good-faith belief that the misconduct occurred. *Rubin Bros. Footwear*, 99 NLRB 610 (1952), enf. denied 203 F.2d 486 (5th Cir. 1952); *Furr's Cafeterias*, 251 NLRB 879 (1980), enfd. mem. 656 F.2d 698 (5th Cir. 1981).[17]

Conversely, I have found that Carolyn Moberly, Mary Helton, Edna Sparks, and Diane King engaged in all of the conduct ascribed by Respondent as the bases for their discharges, or that General Counsel has failed to prove that these individuals did not engage in the conduct which was the subject of Respondent's good-faith belief.

That conduct which ''under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act'' will be deemed serious enough to permit an employer to refuse to reinstate, or to terminate, a striker. *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1984), cert. denied 474 U.S. 1105 (1986).

The assault upon Broaddus and Johnson by Moberly, Helton, and Sparks, the threat by Moberly to Chenault, Moberly's participation in the automobile chase of Curren, and Spark's repeated invitations to fight, and King's car-scratching and invitations to fight all clearly fall within the *Clear Pine Mouldings* standard. The conduct of these individuals clearly constitute lawful grounds for discharge, unless it can be shown that Respondent condoned equal, or worse, conduct by those who did not engage in such conduct. *Aztec Bus Lines*, 289 NLRB 1021 (1989).

General Counsel proved that Curren attacked on a striker's automobile, damaging it, and invited strikers Centers and Moberly to fight. Although Respondent knew of the incident shortly after the event, no discipline was taken against Curren. Therefore, it must be concluded that Respondent did not consider such assaults against property, and invitations to fight, and to be grounds for discipline in a given case where a striker is the victim. This is discrimination that is prohibited by the Act.

Accordingly, although I have found that King has engaged in conduct that would otherwise have privileged discharge (assault on a vehicle and invitations to fight), I conclude because of the discriminatory treatment afforded King by Respondent, Respondent violated Section 8(a)(1) and (3) by discharging King.

At the close of the hearing, I invited counsel to cite to me any case in which a threat to ''get'' someone, without more, came within the *Clear Pine Moulding* standard. Respondent cites none, and I have found none. The closest case offered by Respondent was one in which a high-speed chase had immediately preceded the threat to ''get'' a replacement. Long's threat to ''get'' Hensley was immediately preceded by Long's staggering out of a liquor store, according to Hensley. Hensley was safely[18] in his vehicle, and Long made no attempt to follow him. Under the circumstances, if find

[15] 288 NLRB at 1276, footnote omitted.

[16] *Interstate Paper Supply Co.*, 251 NLRB 1423 fn. 10 (1980).

[17] As any fair reading of Bunch's written statement to Respondent would make it clear that Bunch was solely responsible for precipitating the incident between Baker and himself, I would also find that Respondent did not have a good-faith belief that Baker had engaged in any misconduct.

[18] Long did invite Hensley to step out of the vehicle; however, Hensley did not mention this invitation in his written statement to Anglin, and it could not have been part of the basis for Long's discharge.

that no reasonable person would have been coerced by Long's attempt to do no more than humiliate Hensley by insulting Hensley in the presence of Hensley's wife.

Because Long's misconduct was not of sufficient gravity to have deprived him of the protections of the Act, and certainly it did not compare with the ''terroristic threats'' for which Curren was convicted, I find and conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Long.

There are no incidents that precisely compare with the attack on Broaddus and Johnson by Moberly, Sparks, and Helton. However, General Counsel argues that the possession of a gun while crossing the picket line by a supervisor and another employee who were not striking is worse conduct that than assault at the Maverick Club.[19] I agree. Carrying a deadly weapon around a picket line is such a serious matter that it would be worse than anything short of pointing such a weapon, a felony in any jurisdiction. Certainly the pushing and hair-pulling, or even a punch in the eye, at the Maverick Club does not rise to the level of the implicit threat of the use of deadly force employed by the nonstrikers who displayed their guns for all striking employees to see. Even after Respondent told nonstrikers to keep their guns out of sight, the point remained; nonstrikers were permitted to have deadly weapons in the area of the picket line.[20]

Accordingly, I find that the discharge Helton, solely for her involvement in the Maverick Club incident, violated Section 8(a)(3).

The discharge of Sparks was premised on two actions: the Maverick Club incident and her invitations to nonstrikers to fight. Again, participating in a fight is no worse than carrying guns in the area of the picket line, and Curren's invitation to Centers to fight (categorized by the local courts as ''terroristic threats'') went unpunished. Therefore, the discharge of Sparks constituted discrimination based on her strike activities, and by that discharge Respondent violated Section 8(a)(3) and (1) of the Act, as I conclude.

Although it was not proved who threw it, Chenault was threatened by Moberly immediately after somebody threw a rock at Chenault's car. This was more than a threat to ''get'' a nonstriker; it was a threat immediately preceded by an act of physical violence. Moberly knew Chenault, and presumably knew that Chenault's parents were not physically well. Therefore, when Moberly, threatened to ''get'' Chenault or her parents immediately after the rock assault, it was in a context most likely to coerce nonstriking employee Chenault in the exercise of her Section 7 rights. Nevertheless, the overall context of the situation was one in which Respondent was permitting nonstrikers to carry guns across the picket line (although it did later caution nonstrikers to keep the guns off their dashboards). This conduct by at least two nonstrikers was still worse than any and all of the misconduct proven against Moberly, and I find and conclude that Moberly was discriminatorily discharged and that by Moberly's discharge Respondent violated Section 8(a)(3) of the Act.

Because all 10 discharges violated the Act, each dischargee shall be treated as if he or she had not been discharged in determining the striking employees' rights to reinstatement.

2. Union's application of August 8

General Counsel's Exhibit 17 lists all employees employed by Respondent as of February 1, 1991, with each employee's seniority date. There are 264 employees listed on the exhibit, 80 of whom were hired before the May 1 strike, 76 of whom were hired between May 1 and 14; and 108 who were hired between May 15 and July 25. According to the exhibit, no employees were hired between July 26, 1989, and February 1, 1991.

Each of the 184 employees who were hired during the strike were read a statement that they were hired on a permanent basis, but that there was the possibility that the Union and Respondent could negotiate an agreement requiring termination of the replacements' employment. General Counsel argues on brief, page 66, that the second paragraph of the above quote is ''inconsistent'' with any contention that the replacements were hired as permanent employees. However, General Counsel advances no reason for concluding that there is an inconsistency, and I find none.[21] Moreover, the Supreme Court in *Belknap v. Hale*, 463 U.S. 491 (1983), observed:

> An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and [sic: or?] to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike.

On brief, General Counsel suggests no reason why this reasoning would not apply in this case, and I conclude that it clearly does.[22]

I conclude, on the basis of the above-quoted statement that was read to all replacement employees, Respondent has

[19] Although a great deal of time at the hearing was spent on General Counsel's arguments and evidence of discriminatory treatment of those accused of strike-related violence, Respondent does not address the issue in its 103-page brief.

[20] Compare *Keco Industries*, 276 NLRB 1469 (1985), where a discharge of a striker for possessing a gun in the area of a picket line was sustained, even though no nonstriking employees saw the gun.

[21] The testimony of Chenault that somehow she got the impression that her employment was temporary is so vague as to be meaningless; certainly, Chenault did not testify that she was not read the prepared statement or that she was told by any member of the personnel department that it meant anything different from what it said. She deliberately avoided answering the suggestion that Tudor had told her that her employment was temporary.

[22] Respondent had cited Belknap in certain pretrial communications with the Region, and General Counsel had actual, as well as constructive, knowledge of Belknap and Respondent's reliance on the case. However, General Counsel does not attempt to distinguish Belknap on brief; indeed, Belknap is not mentioned in General Counsel's brief of the issue or in reply to Respondent's motion to strike that portion of General Counsel's brief which argues that Respondent had failed to prove that the replacements were permanent.

proved that all replacement employees were hired as permanent employees.[23]

Because the strike was an economic strike from its inception through May 14, Respondent was not required to displace those employees who were hired during that period. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). However, the strike became an unfair labor practice strike on May 15, so that, upon receipt of unconditional offers to return to work, Respondent was required to reinstate all strikers, even if this required Respondent to displace all replacements who had been hired on or after May 15. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

General Counsel's Exhibit 18 lists 177 of the strikers who had not been reinstated as of February 1, 1991, including Charging Party Smith. In addition are the 10 strikers who were discharged, as I have found, in violation of Section 8(a)(3). There is no question that all 187 of these employees were covered by the Union's unconditional offer to return to work. By its refusal to reinstate any and all of the 187 former strikers who had not been replaced before May 15 upon the Union's August 8 unconditional offer to return to work, Respondent violated Section 8(a)(3) of the Act, as I find and conclude.

3. Individual application of Smith

On July 25, when Betty Smith individually made an unconditional offer to return to work, there were substantially equivalent job openings in existence; however, Respondent refused to reinstate Smith because, Respondent asserts, it was then investigating allegations of strike misconduct by Smith.

There is no evidence of strike misconduct by Smith, or even evidence that Respondent held a good-faith belief of any act of misconduct on Smith's part. Anglin did not testify that he believed Smith had done anything constituting misconduct during the strike.

By July 25, when Smith applied for reinstatement, the strike had been converted to an unfair labor practice strike, and all strikers, such a Smith had become unfair labor practice strikers. Therefore, even if Respondent had been required to displace a ''permanent'' strike replacement, Smith had an immediate right to reinstatement. *Mastro Plastics Corp. v. NLRB*, supra. However, there were 3 openings at the time Smith applied for reinstatement. Therefore, even if there had been no conversion of the strike to the status of an unfair labor practice strike, Respondent was required immediately to reinstate Smith, and it was, as I conclude, a violation of Section 8(a)(3) for Respondent not to have done so. *NLRB v. Mackay Radio & Telegraph Co.*, supra.

D. *Other Alleged Unfair Labor Practices*

The complaint alleges that Respondent violated Section 8(a)(1) by Tudor's assisting returning strikers to withdraw from the Union, soliciting employees to withdraw from the Union, threatening to deny reinstatement to employees until they resigned their union memberships, and telling employees that Respondent did not have a union and that it could not have union members in its plant. The credited testimony of Piersall, Mink, and Carpenter proves that Tudor did precisely those things.

On brief, Respondent argues that the law concerning employer involvement in union membership resignations is stated in *University of Richmond*, 274 NLRB 1204 (1985). It is, as stated in that case:

> The Board has held that an employer may lawfully assist employees in the revocation of their authorization cards [memberships] when employees initiate the idea of withdrawal and have the opportunity to continue or stop the revocation process without the interference or knowledge of the employer. [Footnote citing *Jimmy-Richard Co.*, 210 NLRB 802, 803 (1974).]

The Board found that no violation had been committed because the employees had initiated the idea, each had a free opportunity to discard proffered envelopes that could have been used for the purpose, and there was ''no evidence that the Respondent coerced employees into requesting their cards back.''

In this case, Tudor did not give the employees a chance to initiate the idea of revoking their memberships; he suggested it to them and dispensed composition and clerical assistance. In ''some cases,'' by Tudor's admission, the resignations were then handed over to one of Respondent's clericals for mailing, giving the returning strikers no opportunity to ''stop the revocation process without the interference or knowledge of the employer.'' And the employees were coerced into filing the resignations by Tudor's threats that they could not be reinstated without resigning from the Union.

I find and conclude that, as alleged, by Tudor's conduct Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By the following acts and conduct, Respondent has violated Section 8(a)(1) of the Act.

(a) Threatening employees who were engaged in the protected concerted, and union activity of an economic strike that they would have the right to work for Respondent only if they abandoned the strike and returned to work prior to their being replaced.

(b) Threatening employees that they could not be reinstated to their jobs until they resigned their membership in the Union.

(c) Soliciting employees to withdraw from the Union and assisting them in submitting union withdrawal letters.

(d) Threatening employees that Respondent did not have a union and could not have members of the Union in the plant.

2. By discriminatorily discharging Darcus Ann Baker, Eva Blair, Mary Helton, Diane King, Terry Lear, Carl Long, Carolyn Moberly, Melvin Pennington, Edna Sparks, and Gary Spires, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The following employees of Respondent constitute a unit appropriate for bargaining within the meaning of Section 9(a) of the Act:[24]

[23] This conclusion renders moot Respondent's motion to strike portions of the briefs filed by General Counsel and the Union. However, see *SKS Die Castings & Machinery*, 294 NLRB 372 (1989).

[24] This unit description is as admitted in Respondent's answer.

All production and maintenance employees employed by Respondent at its distribution facilities located on Walnut Meadow Road, Berea, Kentucky, including lead persons but excluding all clerical employees, professional employees and guards, and supervisors as defined in the National Labor Relations Act, as amended.

4. At all times material herein and continuing to date the Union has been the exclusive representative of all employees within said appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union in good faith, from on or about May 15, 1989, until on or about May 30, 1989, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. Respondent's violation of Section 8(a)(5) and (1) of the Act converted the economic strike that began May 1, 1989, into an unfair labor strike on May 15, 1989.

7. Notwithstanding unconditional requests for reinstatement made by Betty Smith on her own behalf on July 25, 1989, and by the Union on behalf of all striking employees on August 8, 1989, the Respondent has discriminatorily refused to reinstate strikers who had not been replaced before May 15, 1989, to their former or substantially equivalent positions, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

8. By the above acts and conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

All employees who participated in the economic strike that began on May 1, 1989, and that was converted to an unfair labor practice strike by the Respondent's violation of Section 8(a)(5) on May 15, 1989, having requested unconditional reinstatement on July 25 and August 8, 1989,[25] the Respondent shall immediately reinstate them to their former or substantially equivalent positions without impairment of their seniority and other rights and privileges. In order to make positions available for them, the Respondent shall dismiss, if necessary, all persons hired on or after May 15, 1989. If, after such dismissals, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union memberships or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practices utilized by the Respondent. Those former strikers who were permanently replaced prior to conversion and for whom no employment is immediately available shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practices utilized by the Respondent, and they shall be reinstated before any other persons are hired or on the departure of their preconversion replacements. *Charles D. Bonnano Linen Service*, 268 NLRB 552 (1984), enfd. 782 F.2d 7 (1st Cir. 1986); *Hydrologics, Inc.*, 293 NLRB 1060 (1989).

The employees entitled to immediate reinstatement shall be made whole for any loss of earnings that they may have suffered by reason of the Respondent's refusals to reinstate them pursuant to their unconditional requests. *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Because of lack of work, Respondent may be absolved from liability for refusing to reinstate, and pay backpay to some of the strikers who offered to return to work on August 8, 1989. That issue (including the subordinate issue of whether work had been shunted to other of Respondent's plants to cause the lack of work, if any) may be decided at the compliance stage of this proceeding. Also, the list of employees employed by Respondent as of February 1, 1991 (on G.C. Exh. 17) may include among those with seniority dates that precede the strike former strikers who were reinstated between August 8, 1989, and February 1, 1991; if so, the reinstatements of those strikers may have been delayed by Respondent's refusal to terminate replacements hired on and after May 15, 1989. This is another matter properly left to the compliance stage.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Gibson Greetings, Inc., of Berea, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees who are engaged in the protected concerted, and union activity of an economic strike that they would have the right to work for Respondent only if they abandoned the strike and returned to work prior to their being replaced.

(b) Threatening employees that they could not be reinstated to their jobs until they resigned their membership in the Union.

(c) Soliciting employees to withdraw from the Union and assisting them in submitting union withdrawal letters.

(d) Threatening employees that Respondent does not have a union and cannot have members of the Union in the plant.

(e) Discriminatorily discharging employees because of their protected concerted, or union, activities.

(f) Refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit found appropriate herein.

(g) Discriminatorily refusing to reinstate strikers to their former or substantially equivalent positions of employment.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[25] As noted, except for the 10 dischargees, all of the strikers who had not been reinstated as of February 1, 1991, are listed on G.C. Exh. 18.

[26] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon request, bargain in good faith with International Brotherhood of Firemen and Oilers, AFL–CIO, as the exclusive bargaining representative of the employees in the following unit and, if an understanding is reached, embody such understanding in a written, signed contract:

> All production and maintenance employees employed by Respondent at its distribution facilities located on Walnut Meadow Road, Berea, Kentucky, including lead persons but excluding all clerical employees, professional employees and guards, and supervisors as defined in the National Labor Relations Act, as amended.

(b) Immediately and fully reinstate Darcus Ann Baker, Eva Blair, Mary Helton, Diane King, Terry Lear, Carl Long, Carolyn Moberly, Melvin Pennington, Edna Sparks, Gary Spires, Betty Smith, and all other of its employees who applied unconditionally for reinstatement after May 15, 1989, to their former or substantially equivalent positions of employment, if available, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, persons hired on or after May 15, 1989, in order to make positions available for them. Make whole these employees for any loss of earnings that they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section above. Place the remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent and offer them employment before any other persons are hired or on the departure of any replacement hired before May 15, 1989.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Berea, Kentucky facility copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''